UNITED STATES REPORTS

VOLUME 438

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1977

JUNE 26 THROUGH JULY 3, 1978

END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

350.973
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1977

HOUCHINS, SHERIFF OF THE COUNTY OF ALAMEDA, CALIFORNIA *v.* KQED, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76–1310. Argued November 29, 1977—Decided June 26, 1978

After respondent broadcasting company, KQED, had been refused permission to inspect and take photographs at a portion (Little Greystone) of a county jail where a prisoner's suicide reportedly had occurred and where conditions were assertedly responsible for prisoners' problems, respondents brought this action under 42 U. S. C. § 1983 against petitioner, who supervised the jail, claiming deprivation of their First Amendment rights. Thereafter petitioner announced a program of regular monthly tours open to the public, including media reporters, of parts of the jail (but not including Little Greystone). Cameras or tape recorders were not allowed on the tours, nor were interviews with inmates. Persons, including members of the media, who knew a prisoner at the jail could visit him. The District Court preliminarily enjoined petitioner from denying KQED news personnel and responsible news media representatives reasonable access to the jail, including Little Greystone, and from preventing their using photographic or sound equipment or from conducting inmate interviews. The Court of Appeals affirmed. *Held:* The judgment is reversed and the case is remanded. Pp. 8–16; 16–19.

546 F. 2d 284, reversed and remanded.

THE CHIEF JUSTICE, joined by MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST, concluded that neither the First Amendment nor the Fourteenth Amendment provides a right of access to government information

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or sources of information within the government's control. The news media have no constitutional right of access to the county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television. *Pell* v. *Procunier*, 417 U. S. 817; *Saxbe* v. *Washington Post*, 417 U. S. 843. Pp. 8–16.

(a) The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter those institutions, gather information, and take pictures for broadcast purposes. The First Amendment does not guarantee a right of access to sources of information within government control. *Grosjean* v. *American Press*, 297 U. S. 233, *Mills* v. *Alabama*, 384 U. S. 214, and other cases relied upon by respondents, concerned the freedom of the press to *communicate* information already obtained, but neither *Grosjean* nor *Mills* indicated that the Constitution *compels* the government to provide the press with information. Pp. 8–12.

(b) Whether the government should open penal institutions in the manner sought by respondents is a matter for legislative, not judicial, resolution. Pp. 12–16.

MR. JUSTICE STEWART, while agreeing that the Constitution does no more than assure the public and the press equal access to information generated or controlled by the government once the government has opened its doors, concluded that terms of access that are reasonably imposed on individual members of the public may—if they impede effective reporting without sufficient justification—be unreasonable as applied to journalists who are at a jail to convey to the general public what the visitors see. KQED was thus clearly entitled to some preliminary relief from the District Court, but not to an order requiring petitioner to permit reporters into the Little Greystone facility and requiring him to let them interview randomly encountered inmates. In those respects the injunction gave the press access to areas and sources of information from which persons on the public tours had been excluded, thus enlarging the scope of what had been opened to public view. Pp. 16–19.

BURGER, C. J., announced the Court's judgment and delivered an opinion, in which WHITE and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 16. STEVENS, J., filed a dissenting opinion, in which BRENNAN and POWELL, JJ., joined, *post*, p. 19. MARSHALL and BLACKMUN, JJ., took no part in the consideration or decision of the case.

Kelvin H. Booty, Jr., argued the cause for petitioner. With him on the briefs was *Richard J. Moore.*

William Bennett Turner argued the cause for respondents. With him on the brief were *Jack Greenberg, James M. Nabrit III*, and *Stanley A. Bass.**

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST joined.

The question presented is whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television.

I

Petitioner Houchins, as Sheriff of Alameda County, Cal., controls all access to the Alameda County Jail at Santa Rita. Respondent KQED operates licensed television and radio broadcasting stations which have frequently reported newsworthy events relating to penal institutions in the San Francisco Bay Area. On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita jail. The report included a statement by a psychiatrist that the conditions at the Greystone facility were responsible for the illnesses of his patient-prisoners there, and a statement from petitioner denying that prison conditions were responsible for the prisoners' illnesses.

KQED requested permission to inspect and take pictures within the Greystone facility. After permission was refused, KQED and the Alameda and Oakland branches of the National Association for the Advancement of Colored People

*Briefs of *amici curiae* urging affirmance were filed by *Christopher B. Fager, William G. Mullen*, and *James R. Cregan* for the National Newspaper Assn. et al.; and by *I. Daniel Stewart, Jr.*, for Kearns-Tribune Corp.

(NAACP) filed suit under 42 U. S. C. § 1983. They alleged that petitioner had violated the First Amendment by refusing to permit media access and failing to provide any effective means by which the public could be informed of conditions prevailing in the Greystone facility or learn of the prisoners' grievances. Public access to such information was essential, they asserted, in order for NAACP members to participate in the public debate on jail conditions in Alameda County. They further asserted that television coverage of the conditions in the cells and facilities was the most effective way of informing the public of prison conditions.

The complaint requested a preliminary and permanent injunction to prevent petitioner from "excluding KQED news personnel from the Greystone cells and Santa Rita facilities and generally preventing full and accurate news coverage of the conditions prevailing therein." On June 17, 1975, when the complaint was filed, there appears to have been no formal policy regarding public access to the Santa Rita jail. However, according to petitioner, he had been in the process of planning a program of regular monthly tours since he took office six months earlier. On July 8, 1975, he announced the program and invited all interested persons to make arrangements for the regular public tours. News media were given notice in advance of the public and presumably could have made early reservations.

Six monthly tours were planned and funded by the county at an estimated cost of $1,800. The first six scheduled tours were filled within a week after the July 8 announcement.[1] A KQED reporter and several other reporters were on the first tour on July 14, 1975.

Each tour was limited to 25 persons and permitted only limited access to the jail. The tours did not include the disciplinary cells or the portions of the jail known as "Little

[1] According to petitioner, the initial public interest in the tours has now subsided and there is no longer a waiting list.

Greystone," the scene of alleged rapes, beatings, and adverse physical conditions. Photographs of some parts of the jail were made available, but no cameras or tape recorders were allowed on the tours. Those on the tours were not permitted to interview inmates, and inmates were generally removed from view.

In support of the request for a preliminary injunction, respondents presented testimony and affidavits stating that other penal complexes had permitted media interviews of inmates and substantial media access without experiencing significant security or administrative problems. They contended that the monthly public tours at Santa Rita failed to provide adequate access to the jail for two reasons: (a) once the scheduled tours had been filled, media representatives who had not signed up for them had no access and were unable to cover newsworthy events at the jail; (b) the prohibition on photography and tape recordings, the exclusion of portions of the jail from the tours, and the practice of keeping inmates generally removed from view substantially reduced the usefulness of the tours to the media.

In response, petitioner admitted that Santa Rita had never experimented with permitting media access beyond that already allowed; he did not claim that disruption had been caused by media access to other institutions. He asserted, however, that unregulated access by the media would infringe inmate privacy,[2] and tend to create "jail celebrities," who in turn tend to generate internal problems and undermine jail security. He also contended that unscheduled media tours would disrupt jail operations.

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[2] It is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights. See, *e. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556 (1974), and cases cited therein. Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however "educational" the process may be for others.

Petitioner filed an affidavit noting the various means by which information concerning the jail could reach the public. Attached to the affidavit were the current prison mail, visitation, and phone call regulations. The regulations allowed inmates to send an unlimited number of letters to judges, attorneys, elected officials, the Attorney General, petitioner, jail officials, or probation officers, all of which could be sealed prior to mailing. Other letters were subject to inspection for contraband but the regulations provided that no inmate mail would be read.

With few exceptions,[3] all persons, including representatives of the media, who knew a prisoner could visit him. Media reporters could interview inmates awaiting trial with the consent of the inmate, his attorney, the district attorney, and the court. Social services officers were permitted to contact "relatives, community agencies, employers, etc.," by phone to assist in counseling inmates with vocational, educational, or personal problems. Maximum-security inmates were free to make unmonitored collect telephone calls from designated areas of the jail without limit.

After considering the testimony, affidavits, and documentary evidence presented by the parties, the District Court preliminarily enjoined petitioner from denying KQED news personnel and "responsible representatives" of the news media access to the Santa Rita facilities, including Greystone, "at reasonable times and hours" and "from preventing KQED news personnel and responsible representatives of the news media from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities."

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[3] Persons who were on parole or had been released from a state prison could not visit without the approval of the commanding officer. Persons released from the Santa Rita or the courthouse jail within a certain period of time were also required to obtain approval to visit from the commanding officer.

The District Court rejected petitioner's contention that the media policy then in effect was necessary to protect inmate privacy or minimize security and administrative problems. It found that the testimony of officials involved with other jails indicated that a "more flexible press policy at Santa Rita [was] both desirable and attainable." The District Court concluded that the respondents had "demonstrated irreparable injury, absence of an adequate remedy at law, probability of success on the merits, a favorable public interest, and a balance of hardships" in their favor.

On interlocutory appeal from the District Court's order, petitioner invoked *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974), where this Court held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." He contended that the District Court had departed from *Pell* and abused its discretion because it had ordered that he give the media greater access to the jail than he gave to the general public. The Court of Appeals rejected petitioner's argument that *Pell* and *Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974), were controlling. It concluded, albeit in three separate opinions,[4] that the public and the media had a First and Fourteenth Amendment right of access to prisons and jails, and sustained the District Court's order.

II

Notwithstanding our holding in *Pell* v. *Procunier*, *supra*, respondents assert that the right recognized by the Court of Appeals flows logically from our decisions construing the First Amendment. They argue that there is a constitutionally guaranteed right to gather news under *Pell* v. *Procunier*, *supra*, at 835, and *Branzburg* v. *Hayes*, 408 U. S. 665, 681, 707 (1972). From the right to gather news and the right to receive information, they argue for an implied special right of access to

[4] See 546 F. 2d 284 (CA9 1976).

government-controlled sources of information. This right, they contend, compels access as a *constitutional* matter. Respondents suggest further support for this implicit First Amendment right in the language of *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936), and *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966), which notes the importance of an informed public as a safeguard against "misgovernment" and the crucial role of the media in providing information. Respondents contend that public access to penal institutions is necessary to prevent officials from concealing prison conditions from the voters and impairing the public's right to discuss and criticize the prison system and its administration.

III

We can agree with many of the respondents' generalized assertions; conditions in jails and prisons are clearly matters "of great public importance." *Pell* v. *Procunier*, *supra*, at 830 n. 7. Penal facilities are public institutions which require large amounts of public funds, and their mission is crucial in our criminal justice system. Each person placed in prison becomes, in effect, a ward of the state for whom society assumes broad responsibility. It is equally true that with greater information, the public can more intelligently form opinions about prison conditions. Beyond question, the role of the media is important; acting as the "eyes and ears" of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic, but like all other components of our society media representatives are subject to limits.

The media are not a substitute for or an adjunct of government and, like the courts, they are "ill equipped" to deal with problems of prison administration. Cf. *Procunier* v. *Martinez*, 416 U. S. 396, 405 (1974). We must not confuse the role of the media with that of government; each has special, crucial

functions, each complementing—and sometimes conflicting with—the other.

The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. Nor does the rationale of the decisions upon which respondents rely lead to the implication of such a right.

Grosjean v. *American Press Co., supra,* and *Mills* v. *Alabama, supra,* emphasized the importance of informed public opinion and the traditional role of a free press as a source of public information. But an analysis of those cases reveals that the Court was concerned with the freedom of the media to *communicate* information once it is obtained; neither case intimated that the Constitution *compels* the government to provide the media with information or access to it on demand. *Grosjean* involved a challenge to a state tax on advertising revenues of newspapers, the "plain purpose" of which was to penalize the publishers and curtail the publication of a selected group of newspapers. 297 U. S., at 251. The Court summarized the familiar but important history of the attempts to prevent criticism of the Crown in England by the infamous licensing requirements and special taxes on the press, *id.,* at 245–247, and concluded that the First Amendment had been designed to prevent similar restrictions or any other "form of previous restraint upon printed publications, or their circulation." *Id.,* at 249.[5]

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[5] The Court relied upon *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 713–716 (1931). More recently in *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415 (1971), these concepts were reaffirmed. See also *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539 (1976); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974).

In discussing the importance of an "untrammeled press," the Court in *Grosjean* readily acknowledged the need for "informed public opinion" as a restraint upon misgovernment. 297 U. S., at 250. It also criticized the tax at issue because it limited "the circulation of information to which the public [was] entitled." *Ibid.* But nothing in the Court's holding implied a special privilege of *access* to information as distinguished from a right to publish information which has been obtained; *Grosjean* dealt only with government attempts to burden and restrain a newspaper's communication with the public. The reference to a public entitlement to information meant no more than that the government cannot restrain communication of whatever information the media acquire—and which they elect to reveal. Cf. *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 838 (1978).

Mills involved a statute making it a crime to publish an editorial about election issues on election day. In striking down the statute, the Court noted that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," 384 U. S., at 218. The Court also discussed the role of the media "as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Id.*, at 219. As in *Grosjean*, however, the Court did not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally.

Branzburg v. *Hayes*, *supra*, offers even less support for the respondents' position. Its observation, in dictum, that "news gathering is not without its First Amendment protections," 408 U. S., at 707, in no sense implied a constitutional right of access to news sources. That observation must be read in context; it was in response to the contention that forcing a reporter to disclose to a grand jury information received in

confidence would violate the First Amendment by deterring news sources from communicating information. *Id.*, at 680. There is an undoubted right to gather news "from any source by means within the law," *id.*, at 681–682, but that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information.

That the Court assumed in *Branzburg* that there is no First Amendment right of access to information is manifest from its statements that

> "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally," *id.*, at 684,

and that

> "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded," *id.*, at 684–685.

Pell v. *Procunier* and *Saxbe* v. *Washington Post Co.* also assumed that there is no constitutional right of access such as the Court of Appeals conceived. In those cases the Court declared, explicitly and without reservation, that the media have "no constitutional right of access to prisons or their inmates beyond that afforded the general public," *Pell*, 417 U. S., at 834; *Saxbe*, 417 U. S., at 850, and on that premise the Court sustained prison regulations that prevented media interviews with inmates.

The fact that the Court relied upon *Zemel* v. *Rusk*, 381 U. S. 1 (1965), in both *Branzburg*, 408 U. S., at 684 n. 22, and *Pell*, *supra*, at 834 n. 9, further negates any notion that the First Amendment confers a right of access to news sources. The appellant in *Zemel* made essentially the same argument that respondents advance here. He contended that the ban on travel to Cuba, then in effect, interfered with his First Amendment right to acquaint himself with the effects of our

Government's foreign and domestic policies and the conditions in Cuba that might affect those policies. Mr. Chief Justice Warren, writing for the Court, flatly rejected the contention that there was a First Amendment right at stake, stating:

> "[T]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information.*" 381 U. S., at 16–17. (Emphasis added.)

The right to *receive* ideas and information is not the issue in this case. See, *e. g., Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976); *Procunier* v. *Martinez,* 416 U. S., at 408–409; *Kleindienst* v. *Mandel,* 408 U. S. 753, 762–763 (1972). The issue is a claimed special privilege of access which the Court rejected in *Pell* and *Saxbe,* a right which is not essential to guarantee the freedom to communicate or publish.

IV

The respondents' argument is flawed, not only because it lacks precedential support and is contrary to statements in this Court's opinions, but also because it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes. Whether the government should open penal institutions in the manner sought by respondents is a question of policy which a legislative body might appropriately resolve one way or the other.

A number of alternatives are available to prevent problems in penal facilities from escaping public attention. The early penal reform movements in this country and England gained impetus as a result of reports from citizens and visiting com-

mittees who volunteered or received commissions to visit penal institutions and make reports. See T. Eriksson, The Reformers 32–42, 69 (Djurklou translation 1976); W. Crawford, Report on the Penitentiaries of the United States vii–viii, xiii–xv, 10–11, App. 9 (1969 ed.); B. McKelvey, American Prisons 52–56, 193 (1936). Citizen task forces and prison visitation committees continue to play an important role in keeping the public informed on deficiencies of prison systems and need for reforms.[6] Grand juries, with the potent subpoena power—not available to the media—traditionally concern themselves with conditions in public institutions; a prosecutor or judge may initiate similar inquiries, and the legislative power embraces an arsenal of weapons for inquiry relating to tax-supported institutions. In each case, these public bodies are generally compelled to publish their findings and, if they default, the power of the media is always available to generate public pressure for disclosure. But the choice as to the most effective and appropriate method is a policy decision to be resolved by legislative decision.[7] We must not confuse what is "good," "desirable," or "expedient" with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication.

Unarticulated but implicit in the assertion that media access to the jail is essential for informed public debate on jail conditions is the assumption that media personnel are the

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[6] See, *e. g.*, Behind the Bars, ABA Report of Young Lawyers Section on Prison Visitation Program 1970–1975; Case, Citizen Participation: An Experiment in Prison-Community Relations, 30 Federal Probation 18, 19–21 (Dec. 1966); Final Report of the Ohio Citizens' Task Force on Corrections A28 (1971); Report of the Illinois Subcommittee on Penal Institutions of the Legislative Comm'n To Visit and Examine State Institutions (1969); Massachusetts, Governor's Task Force on Correctional Industries, Final Report (Sept. 1970); California Correctional System Study, Final Report, California Board of Corrections (July 1971).

[7] The Freedom of Information Act, 5 U. S. C. § 552 (1976 ed.), for example, is the result of legislative decisions.

best qualified persons for the task of discovering malfeasance in public institutions. But that assumption finds no support in the decisions of this Court or the First Amendment. Editors and newsmen who inspect a jail may decide to publish or not to publish what information they acquire. Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 124 (1973); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); Note, The Rights of the Public and the Press To Gather Information, 87 Harv. L. Rev. 1505, 1508, 1513 (1974). Public bodies and public officers, on the other hand, may be coerced by public opinion to disclose what they might prefer to conceal. No comparable pressures are available to anyone to compel publication by the media of what they might prefer not to make known.

There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals' approach, be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems "desirable" or "expedient." We, therefore, reject the Court of Appeals' conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions.

> "There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. [Citing *Pell* v. *Procunier, supra.*] The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.
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> "The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolu-

tion, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society." Stewart, "Or of the Press," 26 Hastings L. J. 631, 636 (1975).

Petitioner cannot prevent respondents from learning about jail conditions in a variety of ways, albeit not as conveniently as they might prefer. Respondents have a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions. See *Procunier* v. *Martinez*, 416 U. S., at 413–418. Respondents are free to interview those who render the legal assistance to which inmates are entitled. See *id.*, at 419. They are also free to seek out former inmates, visitors to the prison, public officials, and institutional personnel, as they sought out the complaining psychiatrist here.

Moreover, California statutes currently provide for a prison Board of Corrections that has the authority to inspect jails and prisons and *must* provide a public report at regular intervals. Cal. Penal Code Ann. §§ 6031–6031.2 (West Supp. 1978). Health inspectors are required to inspect prisons and provide reports to a number of officials, including the State Attorney General and the Board of Corrections. Cal. Health & Safety Code Ann. § 459 (West 1970). Fire officials are also required to inspect prisons. 15 Cal. Admin. Code § 1025 (1976). Following the reports of the suicide at the jail involved here, the County Board of Supervisors called for a report from the County Administrator; held a public hearing on the report, which was open to the media; and called for further reports when the initial report failed to describe the conditions in the cells in the Greystone portion of the jail.

Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. Under our holdings in *Pell* v. *Procunier, supra,* and *Saxbe* v. *Washing-*

ton Post Co., supra, until the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

Reversed and remanded.

MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, concurring in the judgment.

I agree that the preliminary injunction issued against the petitioner was unwarranted, and therefore concur in the judgment. In my view, however, KQED was entitled to injunctive relief of more limited scope.

The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.* Accordingly, I agree substantially with what the opinion of THE CHIEF JUSTICE has to say on that score.

We part company, however, in applying these abstractions to the facts of this case. Whereas he appears to view "equal access" as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.

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*Forces and factors other than the Constitution must determine what government-held data are to be made available to the public. See, *e. g., New York Times Co.* v. *United States,* 403 U. S. 713, 728–730 (concurring opinion).

When on assignment, a journalist does not tour a jail simply for his own edification. He is there to gather information to be passed on to others, and his mission is protected by the Constitution for very specific reasons. "Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised . . . ." *Branzburg* v. *Hayes*, 408 U. S. 665, 726 (dissenting opinion). Our society depends heavily on the press for that enlightenment. Though not without its lapses, the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . ." *Estes* v. *Texas*, 381 U. S. 532, 539. See *Mills* v. *Alabama*, 384 U. S. 214, 219; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250.

That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively. A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

Under these principles, KQED was clearly entitled to some form of preliminary injunctive relief. At the time of the District Court's decision, members of the public were permitted to visit most parts of the Santa Rita jail, and the First and Fourteenth Amendments required the Sheriff to give members of the press *effective* access to the same areas. The Sheriff evidently assumed that he could fulfill this obligation simply

by allowing reporters to sign up for tours on the same terms as the public. I think he was mistaken in this assumption, as a matter of constitutional law.

The District Court found that the press required access to the jail on a more flexible and frequent basis than scheduled monthly tours if it was to keep the public informed. By leaving the "specific methods of implementing such a policy . . . [to] Sheriff Houchins," the court concluded that the press could be allowed access to the jail "at reasonable times and hours" without causing undue disruption. The District Court also found that the media required cameras and recording equipment for effective presentation to the viewing public of the conditions at the jail seen by individual visitors, and that their use could be kept consistent with institutional needs. These elements of the court's order were both sanctioned by the Constitution and amply supported by the record.

In two respects, however, the District Court's preliminary injunction was overbroad. It ordered the Sheriff to permit reporters into the Little Greystone facility and it required him to let them interview randomly encountered inmates. In both these respects, the injunction gave the press access to areas and sources of information from which persons on the public tours had been excluded, and thus enlarged the scope of what the Sheriff and Supervisors had opened to public view. The District Court erred in concluding that the First and Fourteenth Amendments compelled this broader access for the press.

Because the preliminary injunction exceeded the requirements of the Constitution in these respects, I agree that the judgment of the Court of Appeals affirming the District Court's order must be reversed. But I would not foreclose the possibility of further relief for KQED on remand. In my view, the availability and scope of future permanent injunctive relief must depend upon the extent of access then permitted the public, and the decree must be framed to accommodate

equitably the constitutional role of the press and the institutional requirements of the jail.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, dissenting.

The Court holds that the scope of press access to the Santa Rita jail required by the preliminary injunction issued against petitioner is inconsistent with the holding in *Pell* v. *Procunier*, 417 U. S. 817, 834, that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public" and therefore the injunction was an abuse of the District Court's discretion. I respectfully disagree.

Respondent KQED, Inc., has televised a number of programs about prison conditions and prison inmates, and its reporters have been granted access to various correctional facilities in the San Francisco Bay area, including San Quentin State Prison, Soledad Prison, and the San Francisco County Jails at San Bruno and San Francisco, to prepare program material. They have taken their cameras and recording equipment inside the walls of those institutions and interviewed inmates. No disturbances or other problems have occurred on those occasions.

KQED has also reported newsworthy events involving the Alameda County Jail in Santa Rita, including a 1972 newscast reporting a decision of the United States District Court finding that the "shocking and debasing conditions which prevailed [at Santa Rita] constituted cruel and unusual punishment for man or beast as a matter of law." [1] On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita jail. That program also carried a statement by a psychiatrist assigned to Santa Rita to the effect that condi-

[1] See *Brenneman* v. *Madigan*, 343 F. Supp. 128, 132–133 (ND Cal. 1972). Based on a personal visit to the facility, Judge Zirpoli reached the "inescapable conclusion . . . that Greystone should be razed to the ground."

tions in the Greystone facility were responsible for illnesses of inmates.[2] Petitioner's disagreement with that conclusion was reported on the same newscast.

KQED requested permission to visit and photograph the area of the jail where the suicide occurred. Petitioner refused, advising KQED that it was his policy not to permit any access to the jail by the news media. This policy was also invoked by petitioner to deny subsequent requests for access to the jail in order to cover news stories about conditions and alleged incidents within the facility.[3] Except for a carefully supervised tour in 1972, the news media were completely excluded from the inner portions of the Santa Rita jail until after this action was commenced.[4] Moreover, the prison rules provided that all outgoing mail, except letters to judges and lawyers, would be inspected; the rules also prohibited any mention in outgoing correspondence of the names or actions of any correctional officers.

Respondents KQED, and the Alameda and Oakland branches of the National Association for the Advancement of Colored People,[5] filed their complaint for equitable relief on June 17,

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[2] The psychiatrist was discharged after the telecast.

[3] Access was denied, for example, to cover stories of alleged gang rapes and poor physical conditions within the jail, Tr. 208, and of recent escapes from the jail, *id.*, at 135–136.

[4] A previous sheriff had conducted one "press tour" in 1972, attended by reporters and cameramen. But the facility had been "freshly scrubbed" for the tour and the reporters were forbidden to ask any questions of the inmates they encountered, App. 16–17.

[5] The NAACP alleged a "special concern with conditions at . . . Santa Rita, because the prisoner population at the jail is disproportionately black [and the members of the NAACP] depend on the public media to keep them informed of such conditions so that they can meaningfully participate in the current public debate on jail conditions in Alameda County." Complaint, ¶ 3.

Since no special relief was requested by or granted to the NAACP, the parties have focused on the claim of KQED.

1975. The complaint alleged that petitioner had provided no "means by which the public may be informed of conditions prevailing in Greystone or by which prisoners' grievances may reach the public." It further alleged that petitioner's policy of "denying KQED and the public" access to the jail facility violated the First and Fourteenth Amendments to the Constitution and requested the court to enjoin petitioner "from excluding KQED news personnel from the Greystone cells and Santa Rita facilities and generally preventing full and accurate news coverage of the conditions prevailing therein." App. 6–7. With the complaint, respondents filed a motion for a preliminary injunction, supported by affidavits of representatives of the news media, the Sheriff of San Francisco County, and the attorney for respondents. The affidavits of the news media representatives and the Sheriff described the news coverage in other penal institutions and uniformly expressed the opinion that such coverage had no harmful consequences and in fact served a significant public purpose.[6]

In a letter to the County Board of Supervisors dated two days after this suit was instituted, petitioner proposed a pilot public tour program. He suggested monthly tours for 25 persons, with the first tentatively scheduled for July 14. The tours, however, would not include the cell portions of Greystone and would not allow any use of cameras or communication with inmates. The Board approved six such tours. Peti-

[6] The Sheriff had a master's degree in criminology from the University of California at Berkeley and 10 years' experience in law enforcement with the San Francisco Police Department. As Sheriff he had general supervision and control over the jail facilities in San Francisco. He expressed the "opinion, based on my education and experience in law enforcement and jail administration, that such programs make an important contribution to public understanding of jails and jail conditions. In my opinion jails are public institutions and the public has a right to know what is being done with their tax dollars being spent on jail facilities and programs." App. 15.

tioner then filed his answer and supporting affidavit explaining why he had refused KQED access to the jail and identifying the recent changes in policy regarding access to the jail and communication between inmates and persons on the outside. Petitioner stated that if KQED's request had been granted, he would have felt obligated to honor similar requests from other representatives of the press and this could have disrupted mealtimes, exercise times, visiting times, and court appearances of inmates.[7] He pointed out that the mail regulations had recently been amended to delete a prohibition against mentioning the names or actions of any correctional officers. With respect to the scope of the proposed tours, petitioner explained that the use of cameras would be prohibited because it would not be possible to prevent 25 persons with cameras from photographing inmates and security operations. Moreover, communication with inmates would not be permitted because of excessive time consumption, "problems with control" of inmates and visitors, and a belief "that interviewing would be excessively unwieldy." [8]

An evidentiary hearing on the motion for a preliminary injunction was held after the first four guided tours had taken place. The evidence revealed the inadequacy of the tours as a means of obtaining information about the inmates and their conditions of confinement for transmission to the public. The tours failed to enter certain areas of the jail.[9] They afforded no opportunity to photograph conditions within the facility,

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[7] In contrast to the floodgate concerns expressed by petitioner, the Information Officer at San Quentin testified that after the liberalization of access rules at that institution media requests to enter the facility actually declined. Tr. 152. This testimony may suggest that the mere existence of inflexible access barriers generates a concern that conditions within the closed institution require especially close scrutiny.

[8] App. 24.

[9] The tour did not include Little Greystone, which was the subject of reports of beatings, rapes, and poor conditions, or the disciplinary cells.

and the photographs which the county offered for sale to tour visitors omitted certain jail characteristics, such as catwalks above the cells from which guards can observe the inmates.[10] The tours provided no opportunity to question randomly encountered inmates about jail conditions. Indeed, to the extent possible, inmates were kept out of sight during the tour, preventing the tour visitors from obtaining a realistic picture of the conditions of confinement within the jail. In addition, the fixed scheduling of the tours prevented coverage of newsworthy events at the jail.

Of most importance, all of the remaining tours were completely booked, and there was no assurance that any tour would be conducted after December 1975. The District Court found that KQED had no access to the jail and that the broad restraints on access were not required by legitimate penological interests.[11]

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[10] There were also no photos of the women's cells, of the "safety cell," of the "disciplinary cells," or of the interior of Little Greystone. In addition, the photograph of the dayroom omits the television monitor that maintains continuous observation of the inmates and the open urinals.

[11] "Sheriff Houchins admitted that because Santa Rita has never experimented with a more liberal press policy than that presently in existence, there is no record of press disturbances. Furthermore, the Sheriff has no recollection of hearing of any disruption caused by the media at other penal institutions. Nevertheless Sheriff Houchins stated that he feared that invasion of inmates' privacy, creation of jail 'celebrities,' and threats to jail security would result from a more liberal press policy. While such fears are not groundless, convincing testimony was offered that such fears can be substantially allayed.

"As to the inmates' privacy, the media representatives commonly obtain written consent from those inmates who are interviewed and/or photographed, and coverage of inmates is never provided without their full agreement. As to pre-trial detainees who could be harmed by pre-trial publicity, consent can be obtained not only from such inmates but also from their counsel. Jail 'celebrities' are not likely to emerge as a result of a random interview policy. Regarding jail security, any cameras and equipment brought into the jail can be searched. While Sheriff Houchins

The District Court thereafter issued a preliminary injunction, enjoining petitioner "from denying KQED news personnel and responsible representatives of the news media access to the Santa Rita facilities, including Greystone, at reasonable times and hours," or from preventing such representatives "from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities." The court, however, recognized that petitioner should determine the specific means of implementing the order and, in any event, should retain the right to deny access when jail tensions or other special circumstances require exclusion.

The United States Court of Appeals for the Ninth Circuit affirmed, holding that the District Court did not abuse its discretion in framing the preliminary injunction under review.[12] MR. JUSTICE REHNQUIST, acting as Circuit Justice, stayed the mandate and in his opinion on the stay application fairly stated the legal issue we subsequently granted certiorari to decide:

> "The legal issue to be raised by applicant's petition for certiorari seems quite clear. If the 'no greater access' doctrine of *Pell* [v. *Procunier*, 417 U. S. 817,] and *Saxbe* [v. *Washington Post Co.*, 417 U. S. 843,] applies to this

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expressed concern that photographs of electronic locking devices could be enlarged and studied in order to facilitate escape plans, he admitted that the inmates themselves can study and sketch the locking devices. Most importantly, there was substantial testimony to the effect that ground rules laid down by jail administrators, such as a ban on photographs of security devices, are consistently respected by the media.

"Thus upon reviewing the evidence concerning the present media policy at Santa Rita, the Court finds the plaintiffs have demonstrated irreparable injury, absence of an adequate remedy at law, probability of success on the merits, a favorable public interest, and a balance of hardships which must be struck in plaintiffs' favor." App. 69.

[12] 546 F. 2d 284 (1976).

case, the Court of Appeals and the District Court were wrong, and the injunction was an abuse of discretion. If, on the other hand, the holding in *Pell* is to be viewed as impliedly limited to the situation where there already existed substantial press and public access to the prison, then *Pell* and *Saxbe* are not necessarily dispositive, and review by this Court of the propriety of the injunction, in light of those cases, would be appropriate, although not necessary." 429 U. S. 1341, 1344.

For two reasons, which will be discussed separately, the decisions in *Pell* and *Saxbe* do not control the propriety of the District Court's preliminary injunction. First, the unconstitutionality of petitioner's policies which gave rise to this litigation does not rest on the premise that the press has a greater right of access to information regarding prison conditions than do other members of the public. Second, relief tailored to the needs of the press may properly be awarded to a representative of the press which is successful in proving that it has been harmed by a constitutional violation and need not await the grant of relief to members of the general public who may also have been injured by petitioner's unconstitutional access policy but have not yet sought to vindicate their rights.

I

This litigation grew out of petitioner's refusal to allow representatives of the press access to the inner portions of the Santa Rita facility. Following those refusals and the institution of this suit, certain remedial action was taken by petitioner. The mail censorship was relaxed and an experimental tour program was initiated. As a preliminary matter, therefore, it is necessary to consider the relevance of the actions after March 31, 1975, to the question whether a constitutional violation had occurred.

It is well settled that a defendant's corrective action in

anticipation of litigation or following commencement of suit does not deprive the court of power to decide whether the previous course of conduct was unlawful. See *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633, and cases cited.[13] The propriety of the court's exercise of that power in this case is apparent. When this suit was filed, there were no public tours. Petitioner enforced a policy of virtually total exclusion of both the public and the press from those areas within the Santa Rita jail where the inmates were confined. At that time petitioner also enforced a policy of reading all inmate correspondence addressed to persons other than lawyers and judges and censoring those portions that related to the conduct of the guards who controlled their daily existence. Prison policy as well as prison walls significantly abridged the opportunities for communication of information about the conditions of confinement in the Santa Rita facility to the public.[14] Therefore,

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[13] Moreover, along with the power to decide the merits, the court's power to grant injunctive relief survives the discontinuance of illegal conduct. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States* v. *Oregon Medical Soc.*, 343 U. S. 326, 333. When the District Court issued the preliminary injunction, there was no assurance that the experimental public tours would continue beyond the next month. Thus, it would certainly have been reasonable for the court to assume that, absent injunctive relief, the access to the inner portions of the Santa Rita facility would soon be reduced to its prelitigation level.

[14] Thus, when this suit was filed, there existed no opportunity for outsiders to observe the living conditions of the inmates at Santa Rita. And the mail regulations prohibited statements about the character of the treatment of prisoners by correctional officers.

I cannot agree with petitioner that the inmates' visitation and telephone privileges were reasonable alternative means of informing the public at large about conditions within Santa Rita. Neither offered an opportunity to observe those conditions. Even if a member of the general public or a representative of the press were fortunate enough to obtain the

even if there would not have been any constitutional violation had the access policies adopted by petitioner following commencement of this litigation been in effect all along, it was appropriate for the District Court to decide whether the restrictive rules in effect when KQED first requested access were constitutional.

In *Pell* v. *Procunier*, 417 U. S., at 834, the Court stated that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." But the Court has never intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid

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name of an inmate to visit, access to the facility would not have included the inmate's place of confinement. The jail regulations do not indicate that an inmate in the minimum-security portion of the jail may enlist the aid of Social Service officers to telephone the press or members of the general public to complain of the conditions of confinement. App. 38. Even if a maximum-security inmate may make collect telephone calls, it is unlikely that a member of the general public or representative of the press would accept the charges, especially without prior knowledge of the call's communicative purpose.

Although sentenced prisoners may not be interviewed under any circumstances, pretrial detainees may, according to petitioner, be interviewed with the consent of the inmate, defense counsel, and prosecutor, and with an order from the court. Not only would such an interview take place outside the confines of the jail, but the requirement of a court order makes this a patently inadequate means of keeping the public informed about the jail and its inmates.

Finally, petitioner suggests his willingness to provide the press with information regarding the release of prisoners which, according to petitioner, would permit interviews of former prisoners regarding the conditions of their recent confinement. This informal offer was apparently only made in response to respondents' lawsuit. Moreover, it too fails to afford the public any opportunity to observe the conditions of confinement.

Hence, the means available at the time this suit was instituted for informing the general public about conditions in the Santa Rita jail were, as a practical matter, nonexistent.

constitutional scrutiny.[15] Indeed, *Pell* itself strongly suggests the contrary.

In that case, representatives of the press claimed the right to interview specifically designated inmates. In evaluating this claim, the Court did not simply inquire whether prison officials allowed members of the general public to conduct such interviews. Rather, it canvassed the opportunities already available for both the public and the press to acquire information regarding the prison and its inmates. And the Court found that the policy of prohibiting interviews with inmates specifically designated by the press was "not part of an attempt by the State to conceal the conditions in its prisons." *Id.*, at 830. The challenged restriction on access, which was imposed only after experience revealed that such interviews posed disciplinary problems, was an isolated limitation on the efforts of the press to gather information about those conditions. It was against the background of a record which demonstrated that both the press and the general public were "accorded full opportunities to observe prison conditions," [16]

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[15] In *Zemel* v. *Rusk*, 381 U. S. 1, 17, the Court said:

"The right to speak and publish does not carry with it the *unrestrained* right to gather information." (Emphasis added.)

And in *Branzburg* v. *Hayes*, 408 U. S. 665, 681:

"We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."

Both statements imply that there is a right to acquire knowledge that derives protection from the First Amendment. See *id.*, at 728 n. 4 (STEWART, J., dissenting).

[16] "The Department of Corrections regularly conducts public tours through the prisons for the benefit of interested citizens. In addition, newsmen are permitted to visit both the maximum security and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institu-

that the Court considered the constitutionality of the single restraint on access challenged in *Pell*.

The decision in *Pell*, therefore, does not imply that a state policy of concealing prison conditions from the press, or a policy denying the press any opportunity to observe those conditions, could have been justified simply by pointing to like concealment from, and denial to, the general public. If that were not true, there would have been no need to emphasize the substantial press and public access reflected in the record of that case.[17] What *Pell* does indicate is that the question whether respondents established a probability of prevailing on

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tions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on group meetings and to interview the inmate participants." 417 U. S., at 830.

[17] Nor would it have been necessary to note, as the *Pell* opinion did, the fact that the First Amendment protects the free flow of information to the public:

"The constitutional guarantee of a free press 'assures the maintenance of our political system and an open society,' *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967), and secures 'the paramount public interest in a free flow of information to the people concerning public officials,' *Garrison* v. *Louisiana*, 379 U. S. 64, 77 (1964). See also *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). By the same token, '"[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."' *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). Correlatively, the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published. *Kleindienst* v. *Mandel*, 408 U. S., at 762–763; *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969).

"In *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), the Court went further and acknowledged that 'news gathering is not without its First Amendment protections,' *id.*, at 707, for 'without some protection for seeking out the news, freedom of the press could be eviscerated,' *id.*, at 681." *Id.*, at 832–833.

their constitutional claim is inseparable from the question whether petitioner's policies unduly restricted the opportunities of the general public to learn about the conditions of confinement in Santa Rita jail. As in *Pell*, in assessing its adequacy, the total access of the public and the press must be considered.

Here, the broad restraints on access to information regarding operation of the jail that prevailed on the date this suit was instituted are plainly disclosed by the record. The public and the press had consistently been denied any access to those portions of the Santa Rita facility where inmates were confined and there had been excessive censorship of inmate correspondence. Petitioner's no-access policy, modified only in the wake of respondents' resort to the courts, could survive constitutional scrutiny only if the Constitution affords no protection to the public's right to be informed about conditions within those public institutions where some of its members are confined because they have been charged with or found guilty of criminal offenses.

II

The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution.[18] It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas. See, *e. g., Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 756; *Procunier* v. *Martinez*, 416 U. S. 396, 408–409; *Kleindienst* v. *Mandel*, 408 U. S. 753, 762–763.[19]

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[18] See, *e. g., Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 764–765; *Garrison* v. *Louisiana*, 379 U. S. 64, 77; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 266–270; *Associated Press* v. *United States*, 326 U. S. 1, 20; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250. See also *Branzburg* v. *Hayes*, 408 U. S. 665, 726 n. 2 (STEWART, J., dissenting).

[19] See also *Lamont* v. *Postmaster General*, 381 U. S. 301; *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390; *Stanley* v. *Georgia*, 394 U. S.

Thus, in *Procunier* v. *Martinez, supra,* the Court invalidated prison regulations authorizing excessive censorship of outgoing inmate correspondence because such censorship abridged the rights of the intended recipients. See also *Morales* v. *Schmidt,* 489 F. 2d 1335, 1346 n. 8 (CA7 1973). So here, petitioner's prelitigation prohibition on mentioning the conduct of jail officers in outgoing correspondence must be considered an impingement on the noninmate correspondent's interest in receiving the intended communication.

In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential societal function.[20] Our system of self-government assumes the existence of an informed citizenry.[21] As Madison wrote:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce

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557, 564; *Martin* v. *City of Struthers,* 319 U. S. 141; *Marsh* v. *Alabama,* 326 U. S. 501.

[20] "What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. . . . It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression." *Saxbe* v. *Washington Post Co.,* 417 U. S. 843, 862–863 (POWELL, J., dissenting).

[21] See A. Meiklejohn, Free Speech and Its Relation to Self-Government 26 (1948):

"Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*"

> or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910).

It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.[22]

For that reason information gathering is entitled to some measure of constitutional protection. See, *e. g., Branzburg* v. *Hayes*, 408 U. S. 665, 681; *Pell* v. *Procunier*, 417 U. S., at 833.[23] As this Court's decisions clearly indicate, however, this protection is not for the private benefit of those who might qualify as representatives of the "press" but to insure that the citizens are fully informed regarding matters of public interest and importance.

In *Grosjean* v. *American Press Co.*, 297 U. S. 233, represent-

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[22] Admittedly, the right to receive or acquire information is not specifically mentioned in the Constitution. But "the protection of the Bill of Rights goes beyond the specific guarantees to protect from . . . abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont* v. *Postmaster General*, 381 U. S., at 308 (BRENNAN, J., concurring). It would be an even more barren marketplace that had willing buyers and sellers and no meaningful information to exchange.

[23] See also *Branzburg* v. *Hayes*, *supra*, at 728 (STEWART, J., dissenting):

"No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist."

atives of the "press" challenged a state tax on the advertising revenues of newspapers. In the Court's words, the issue raised by the tax went "to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests." *Id.*, at 243. The opinion described the long struggle in England against the stamp tax and tax on advertisements—the so-called "taxes on knowledge":

> "[I]n the adoption of the [taxes] the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. . . . The aim of the struggle [against those taxes] was . . . to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as 'taxes on knowledge' sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake." *Id.*, at 247.

Noting the familiarity of the Framers with this struggle, the Court held:

> "[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad . . . because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.*, at 250.

A recognition that the "underlying right is the right of the public generally" [24] is also implicit in the doctrine that "news-

[24] *Saxbe* v. *Washington Post Co.*, *supra*, at 864 (POWELL, J., dissenting).

men have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Pell* v. *Procunier, supra,* at 834. In *Pell* it was unnecessary to consider the extent of the public's right of access to information regarding the prison and its inmates in order to adjudicate the press claim to a particular form of access, since the record demonstrated that the flow of information to the public, both directly and through the press, was adequate to survive constitutional challenge; institutional considerations justified denying the single, additional mode of access sought by the press in that case.

Here, in contrast, the restrictions on access to the inner portions of the Santa Rita jail that existed on the date this litigation commenced concealed from the general public the conditions of confinement within the facility. The question is whether petitioner's policies, which cut off the flow of information at its source, abridged the public's right to be informed about those conditions.

The answer to that question does not depend upon the degree of public disclosure which should attend the operation of most governmental activity. Such matters involve questions of policy which generally must be resolved by the political branches of government.[25] Moreover, there are unquestionably occasions when governmental activity may properly be carried on in complete secrecy. For example, the public and the press are commonly excluded from "grand jury proceed-

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[25] In *United States* v. *Nixon,* 418 U. S. 683, 705 n. 15, we pointed out that the Founders themselves followed a policy of confidentiality:

"There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi–xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written. C. Warren, The Making of the Constitution 134–139 (1937)."

ings, our own conferences, [and] the meetings of other official bodies gathered in executive session . . . ." *Branzburg* v. *Hayes*, 408 U. S., at 684; *Pell* v. *Procunier*, 417 U. S., at 834.[26] In addition, some functions of government—essential to the protection of the public and indeed our country's vital interests—necessarily require a large measure of secrecy, subject to appropriate legislative oversight.[27] In such situations the reasons for withholding information from the public are both apparent and legitimate.

In this case, however, "[r]espondents do not assert a right to force disclosure of confidential information or to invade in any way the decisionmaking processes of governmental officials." [28] They simply seek an end to petitioner's policy of concealing prison conditions from the public. Those condi-

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[26] In the case of grand jury proceedings, for example, the secrecy rule has been justified on several grounds:

"'(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.'" *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 681–682, n. 6, quoting *United States* v. *Rose*, 215 F. 2d 617, 628–629 (CA3 1959).

[27] In *United States* v. *Nixon, supra*, we also recognized the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties, explaining that "the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." 418 U. S., at 705.

[28] *Saxbe* v. *Washington Post Co.*, 417 U. S., at 861 (POWELL, J., dissenting).

tions are wholly without claim to confidentiality. While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.[29]

The reasons which militate in favor of providing special protection to the flow of information to the public about prisons relate to the unique function they perform in a democratic society. Not only are they public institutions, financed with public funds and administered by public servants,[30] they are an integral component of the criminal justice system. The citizens confined therein are temporarily, and sometimes permanently, deprived of their liberty as a result of a trial which must conform to the dictates of the Constitution. By express command of the Sixth Amendment the proceeding must be a "public trial." [31] It is important not only that the

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[29] The Court in *Saxbe* noted that "'prisons are institutions where public access is generally limited.'" *Id.*, at 849 (citation omitted). This truism reflects the fact that there are legitimate penological interests served by regulating access, *e. g.*, security and confinement. But concealing prison conditions from the public is not one of those legitimate objectives. *Nixon* v. *Warner Communications, Inc.*, 435 U. S. 589, decided this Term, does not suggest a contrary conclusion. The effect of the Court's decision in that case was to limit the access by the electronic media to the Nixon tapes to that enjoyed by the press and the public at the time of the trial. That case presented "no question of a truncated flow of information to the public." *Id.*, at 609.

[30] "The administration of these institutions, the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein are all matters of legitimate societal interest and concern." *Saxbe* v. *Washington Post Co.*, *supra*, at 861 (POWELL, J., dissenting).

[31] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . ." U. S. Const., Amdt. 6.

trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding.[32] That public interest survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation. While a ward of the State and subject to its stern discipline, he retains constitutional protections against cruel and unusual punishment, see, *e. g., Estelle* v. *Gamble,* 429 U. S. 97, a protection which may derive more practical support from access to information about prisons by the public than by occasional litigation in a busy court.[33]

Some inmates—in Santa Rita, a substantial number—are pretrial detainees. Though confined pending trial, they have not been convicted of an offense against society and are entitled to the presumption of innocence. Certain penological objectives, *i. e.,* punishment, deterrence, and rehabilitation, which are legitimate in regard to convicted prisoners, are inapplicable to pretrial detainees.[34] Society has a special interest

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[32] "The right to a public trial is not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake . . . ." *Lewis* v. *Peyton,* 352 F. 2d 791, 792 (CA4 1965). See also *In re Oliver,* 333 U. S. 257, 270: "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

[33] In fact, conditions within the Greystone portion of the Santa Rita facility had been found to constitute cruel and unusual punishment. *Brenneman* v. *Madigan,* 343 F. Supp., at 132–133. The public's interest in ensuring that these conditions have been remedied is apparent. For, in final analysis, it is the citizens who bear responsibility for the treatment accorded those confined within penal institutions.

[34] "Incarceration after conviction is imposed to punish, to deter, and to rehabilitate the convict. . . . Some freedom to accomplish these ends must of necessity be afforded prison personnel. Conversely, where incarceration is imposed prior to conviction, deterrence, punishment, and retribution are not legitimate functions of the incarcerating officials. Their role is but a temporary holding operation, and their necessary freedom of action is concomitantly diminished. . . . Punitive measures in such a context are

in ensuring that unconvicted citizens are treated in accord with their status.

In this case, the record demonstrates that both the public and the press had been consistently denied any access to the inner portions of the Santa Rita jail, that there had been excessive censorship of inmate correspondence, and that there was no valid justification for these broad restraints on the flow of information. An affirmative answer to the question whether respondents established a likelihood of prevailing on the merits did not depend, in final analysis, on any right of the press to special treatment beyond that accorded the public at large. Rather, the probable existence of a constitutional violation rested upon the special importance of allowing a democratic community access to knowledge about how its servants were treating some of its members who have been committed to their custody. An official prison policy of concealing such knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution.[35]

III

The preliminary injunction entered by the District Court granted relief to KQED without providing any specific remedy for other members of the public. Moreover, it imposed duties on petitioner that may not be required by the Constitution itself. The injunction was not an abuse of discretion for either of these reasons.

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out of harmony with the presumption of innocence." *Anderson* v. *Nosser*, 438 F. 2d 183, 190 (CA5 1971).

[35] When fundamental freedoms of citizens have been at stake, the Court has recognized that an abridgment of those freedoms may follow from a wide variety of governmental policies. See, *e. g.*, *American Communications Assn.* v. *Douds*, 339 U. S. 382; *NAACP* v. *Alabama*, 357 U. S. 449; *Boyd* v. *United States*, 116 U. S. 616; *Grosjean* v. *American Press Co.*, 297 U. S. 233.

If a litigant can prove that he has suffered specific harm from the application of an unconstitutional policy, it is entirely proper for a court to grant relief tailored to his needs without attempting to redress all the mischief that the policy may have worked on others. Though the public and the press have an equal right to receive information and ideas, different methods of remedying a violation of that right may sometimes be needed to accommodate the special concerns of the one or the other. Preliminary relief could therefore appropriately be awarded to KQED on the basis of its proof of how it was affected by the challenged policy without also granting specific relief to the general public. Indeed, since our adversary system contemplates the adjudication of specific controversies between specific litigants, it would have been improper for the District Court to attempt to provide a remedy to persons who have not requested separate relief. Accordingly, even though the Constitution provides the press with no greater right of access to information than that possessed by the public at large, a preliminary injunction is not invalid simply because it awards special relief to a successful litigant which is a representative of the press.[36]

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[36] Moreover, the relief granted to KQED will redound to the benefit of members of the public interested in obtaining information about conditions in the Santa Rita jail. The press may have no greater constitutional right to information about prisons than that possessed by the general public. But when the press does acquire information and disseminate it to the public, it performs an important societal function.

"In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment." *Saxbe* v. *Washington Post Co.*, 417 U. S., at 863–864 (POWELL, J., dissenting).

See also *Branzburg* v. *Hayes*, 408 U. S., at 726–727 (STEWART, J., dissenting).

In the context of fashioning a remedy for a violation of rights protected

Nor is there anything novel about injunctive relief which goes beyond a mere prohibition against repetition of previous unlawful conduct. In situations which are both numerous and varied the chancellor has required a wrongdoer to take affirmative steps to eliminate the effects of a violation of law even though the law itself imposes no duty to take the remedial action decreed by the court.[37] It follows that if prison regulations and policies have unconstitutionally suppressed information and interfered with communication in violation of the First Amendment, the District Court has the power to require, at least temporarily, that the channels of communication be opened more widely than the law would otherwise require in order to let relevant facts, which may have been concealed, come to light. Whether or not final relief along the lines of that preliminarily awarded in this case would be "aptly tailored to remedy the consequences of the constitutional violation," *Milliken* v. *Bradley*, 433 U. S. 267, 287, it is perfectly clear that the court had power to enter an injunction which was broader than a mere prohibition against illegal conduct.

The Court of Appeals found no reason to question the specific preliminary relief ordered by the District Court. Nor is it appropriate for this Court to review the scope of the order.[38] The order was preliminary in character, and would have been subject to revision before the litigation reached a final conclusion.

I would affirm the judgment of the Court of Appeals.

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by the First Amendment, consideration of the role of the press in our society is appropriate.

[37] For an extensive discussion of this practice in the context of desegregation decrees, see the Court's opinion last Term in *Milliken* v. *Bradley*, 433 U. S. 267.

[38] It should be noted, however, that the District Court was presented with substantial evidence indicating that the use of cameras and interviews with randomly selected inmates neither jeopardized security nor threatened legitimate penological interests in other prisons where such access was permitted. See *Procunier* v. *Martinez*, 416 U. S. 396, 414 n. 14.

Syllabus

UNITED STATES *v.* GRAYSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76–1572. Argued February 22, 1978—Decided June 26, 1978

A sentencing judge, in fixing the sentence of a defendant within statutory limits, may consider the defendant's false testimony observed by the judge during the trial. Pp. 45–55.

(a) A defendant's truthfulness or mendacity while testifying on his own behalf is probative of his attitudes toward society and prospects for rehabilitation, and is thus a relevant factor in the sentencing process. Pp. 50–51.

(b) Taking into account a defendant's false testimony does not constitute punishment for the crime of perjury for which the defendant has not been indicted, tried, or convicted by due process; rather, it is an attempt rationally to exercise judicial discretion by evaluating the defendant's personality and prospects for rehabilitation. To the extent that a sentencing judge is precluded from relying on relevant information concerning "every aspect of a defendant's life," *Williams* v. *New York*, 337 U. S. 241, 250, the effort to appraise character degenerates into a game of chance. Pp. 53–54.

(c) Judicial consideration of the defendant's conduct during trial does not impermissibly "chill" his constitutional right to testify in his own behalf, for the right guaranteed to a defendant is the right to testify truthfully in accordance with his oath. A sentencing judge, however, is not required automatically to enhance the sentence of a defendant who falsely testifies but, rather, the judge is authorized where he determines that the testimony is willfully and materially false to assess the defendant's rehabilitation prospects in light of that and all the other knowledge gained about the defendant. Pp. 54–55.

550 F. 2d 103, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 55.

Solicitor General McCree argued the cause for the United States. With him on the briefs were *Assistant Attorney Gen-*

eral Civiletti, Kenneth S. Geller, Sidney M. Glazer, and *Paul J. Brysh.*

John M. Humphrey argued the cause and filed a brief for respondent.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a holding of the Court of Appeals that it was improper for a sentencing judge, in fixing the sentence within the statutory limits, to give consideration to the defendant's false testimony observed by the judge during the trial.

I

In August 1975, respondent Grayson was confined in a federal prison camp under a conviction for distributing a controlled substance. In October, he escaped but was apprehended two days later by FBI agents in New York City. He was indicted for prison escape in violation of 18 U. S. C. § 751 (a) (1976 ed.).

During its case in chief, the United States proved the essential elements of the crime, including his lawful confinement and the unlawful escape. In addition, it presented the testimony of the arresting FBI agents that Grayson, upon being apprehended, denied his true identity.

Grayson testified in his own defense. He admitted leaving the camp but asserted that he did so out of fear: "I had just been threatened with a large stick with a nail protruding through it by an inmate that was serving time at Allenwood, and I was scared, and I just ran." He testified that the threat was made in the presence of many inmates by prisoner Barnes who sought to enforce collection of a gambling debt and followed other threats and physical assaults made for the same purpose. Grayson called one inmate, who testified: "I heard

[Barnes] talk to Grayson in a loud voice one day, but that's all. I never seen no harm, no hands or no shuffling whatsoever."

Grayson's version of the facts was contradicted by the Government's rebuttal evidence and by cross-examination on crucial aspects of his story. For example, Grayson stated that after crossing the prison fence he left his prison jacket by the side of the road. On recross, he stated that he also left his prison shirt but not his trousers. Government testimony showed that on the morning after the escape, a shirt marked with Grayson's number, a jacket, and a pair of prison trousers were found outside a hole in the prison fence.[1] Grayson also testified on cross-examination: "I do believe that I phrased the rhetorical question to Captain Kurd, who was in charge of [the prison], and I think I said something if an inmate was being threatened by somebody, what would . . . he do? First of all he said he would want to know who it was." On further cross-examination, however, Grayson modified his description of the conversation. Captain Kurd testified that Grayson had never mentioned in any fashion threats from other inmates. Finally, the alleged assailant, Barnes, by then no longer an inmate, testified that Grayson had never owed him any money and that he had never threatened or physically assaulted Grayson.

The jury returned a guilty verdict, whereupon the District Judge ordered the United States Probation Office to prepare a

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[1] The testimony regarding the prison clothing was important for reasons in addition to the light it shed on quality of recollection. Grayson stated that after unpremeditatedly fleeing the prison with no possessions and crossing the fence, he hitchhiked to New York City—a difficult task for a man with no trousers. The United States suggested that by prearrangement Grayson met someone, possibly a woman friend, on the highway near the break in the fence and that this accomplice provided civilian clothes. It introduced evidence that the friend visited Grayson often at prison, including each of the three days immediately prior to his penultimate day in the camp.

presentence report. At the sentencing hearing, the judge stated:

> "I'm going to give my reasons for sentencing in this case with clarity, because one of the reasons may well be considered by a Court of Appeals to be impermissible; and although I could come into this Court Room and sentence this Defendant to a five-year prison term without any explanation at all, I think it is fair that I give the reasons so that if the Court of Appeals feels that one of the reasons which I am about to enunciate is an improper consideration for a trial judge, then the Court will be in a position to reverse this Court and send the case back for re-sentencing.
>
> "In my view a prison sentence is indicated, and the sentence that the Court is going to impose is to deter you, Mr. Grayson, and others who are similarly situated. Secondly, *it is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing, and I will do so.*" (Emphasis added.)

He then sentenced Grayson to a term of two years' imprisonment, consecutive to his unexpired sentence.[2]

On appeal, a divided panel of the Court of Appeals for the Third Circuit directed that Grayson's sentence be vacated and that he be resentenced by the District Court without consideration of false testimony. 550 F. 2d 103 (1977). Two judges concluded that this result was mandated by language in a prior decision of the Third Circuit, *Poteet* v. *Fauver*, 517 F. 2d 393, 395 (1975): "[T]he sentencing judge may not add a penalty because he believes the defendant lied." One judge, in a concurring opinion, suggested that the District Court's reliance on Grayson's false testimony in fixing the sentence

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[2] The District Court in this case could have sentenced Grayson for any period up to five years. 18 U. S. C. § 751 (a) (1976 ed.).

"trenches upon a defendant's constitutional privilege to testify in his own behalf as well as his right to have criminal charges," such as one for perjury, formally adjudicated "pursuant to procedures required by due process." 550 F. 2d, at 108. The dissenting judge challenged both the applicability of *Poteet* and the suggestion that the District Court's approach to Grayson's sentence was constitutionally impermissible.

We granted certiorari to resolve conflicts between holdings of the Courts of Appeals.[3] 434 U. S. 816 (1977). We reverse.

II

In *Williams* v. *New York*, 337 U. S. 241, 247 (1949), Mr. Justice Black observed that the "prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime," and that, accordingly, sentences should be determined with an eye toward the "[r]eformation and rehabilitation of offenders." *Id.*, at 248. But it has not always been so. In the early days of the Republic, when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature. Each crime had its defined punishment. See Report of Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 83–85 (1976) (Task Force Report). The "excessive rigidity of the [mandatory or fixed sentence]

[3] Compare the decision in the present case, 550 F. 2d 103 (1977), and *Scott* v. *United States*, 135 U. S. App. D. C. 377, 419 F. 2d 264 (1969), with *United States* v. *Hendrix*, 505 F. 2d 1233 (CA2 1974), cert. denied, 423 U. S. 897 (1975); *United States* v. *Moore*, 484 F. 2d 1284 (CA4 1973); *United States* v. *Nunn*, 525 F. 2d 958 (CA5 1976); *United States* v. *Wallace*, 418 F. 2d 876 (CA6 1969), cert. denied, 397 U. S. 955 (1970); *United States* v. *Levine*, 372 F. 2d 70 (CA7 1967); *Hess* v. *United States*, 496 F. 2d 936 (CA8 1974); *United States* v. *Cluchette*, 465 F. 2d 749 (CA9 1972); and *Humes* v. *United States*, 186 F. 2d 875 (CA10 1951).

system" soon gave way in some jurisdictions, however, to a scheme permitting the sentencing judge—or jury—to consider aggravating and mitigating circumstances surrounding an offense, and, on that basis, to select a sentence within a *range* defined by the legislature. Tappan, Sentencing Under the Model Penal Code, 23 Law & Contemp. Prob. 528, 529 (1958). Nevertheless, the focus remained on the crime: Each particular offense was to be punished in proportion to the social harm caused by it and according to the offender's culpability.[4] See, *e. g.*, Iowa Code of 1851, Tit. XXIV, ch. 182, §§ 3067, 3068, reprinted in S. Rubin, Law of Criminal Correction 131–132 (2d ed. 1973). The purpose of incarceration remained, primarily, retribution and punishment.

Approximately a century ago, a reform movement asserting that the purpose of incarceration, and therefore the guiding consideration in sentencing, should be rehabilitation of the offender,[5] dramatically altered the approach to sentencing. A fundamental proposal of this movement was a flexible sentencing system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism. Task Force Report 82. Indeed, the most extreme formulations of the emerging rehabilitation model, with its "reformatory sentence," posited that "convicts [regardless of the nature of their crime] can never be rightfully imprisoned except upon proof that it is unsafe for themselves and for society to leave them free, and when confined can never be rightfully released until they show themselves fit for membership in a free community." Lewis, The Indeterminate Sentence, 9 Yale L. J. 17, 27 (1899).

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[4] See Task Force Report 88.

[5] The National Prison Association in its influential 1870 Declaration of Principles, asserted that "punishment is directed not to the crime but the criminal." *Id.*, at 93.

This extreme formulation, although influential, was not adopted unmodified by any jurisdiction. See Tappan, *supra*, at 531–533. "The influences of legalism and realism were powerful enough . . . to prevent the enactment of this form of indeterminate sentencing. Concern for personal liberty, skepticism concerning administrative decisions about prisoner reformation and readiness for release, insistence upon the preservation of some measure of deterrent emphasis, and other such factors, undoubtedly, led, instead, to a system—indeed, a complex of systems—in which maximum terms were generally employed." *Id.*, at 530. Thus it is that today the extent of a federal prisoner's confinement is initially determined by the sentencing judge, who selects a term within an often broad, congressionally prescribed range; release on parole is then available on review by the United States Parole Commission, which, as a general rule, may conditionally release a prisoner any time after he serves one-third of the judicially fixed term.[6] See 18 U. S. C. § 4205 (1976 ed.). To an unspecified degree,[7] the sentencing judge is obligated to make his decision on the

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[6] The evolutionary development of sentencing and incarceration practices continues to engage attention. See S. 1437, 95th Cong., 1st Sess., Part III (1977); Task Force Report. Increasingly there are doubts concerning the validity of earlier, uncritical acceptance of the rehabilitation model. So experienced a penologist as the late Torsten Eriksson, long Director of Prisons in Sweden and later United Nations Interregional Advisor on Crime Prevention and Criminal Justice, dedicated his 1976 book, The Reformers: An Historical Survey of Pioneer Experiments in the Treatment of Criminals (Djurklou transl.), "[t]o those who tried, even if they failed."

[7] See Task Force Report 74:

"In the United States today, rehabilitative assumptions play some role in determining whether and for how long defendants have to be confined, but the precise weight given to such assumptions varies enormously among judges."

But to some of the most thoughtful and experienced correctional authorities, the optimistic predictions of earlier years on the efficacy of rehabilitation are undergoing reappraisal. See, *e. g.*, Eriksson, *supra*, n. 6.

basis, among others, of predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation.[8]

Indeterminate sentencing under the rehabilitation model presented sentencing judges with a serious practical problem: how rationally to make the required predictions so as to avoid capricious and arbitrary sentences, which the newly conferred and broad discretion placed within the realm of possibility. An obvious, although only partial, solution was to provide the judge with as much information as reasonably practical concerning the defendant's "character and propensities[,] . . . his present purposes and tendencies," *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937), and, indeed, "every aspect of [his] life." *Williams* v. *New York*, 337 U. S., at 250. Thus, most jurisdictions provided trained probation officers to conduct presentence investigations of the defendant's life and, on that basis, prepare a presentence report for the sentencing judge.[9]

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[8] See Shimm, Foreword, 23 Law & Contemp. Prob. 399 (1958):

"Signalizing, on the one hand, the termination of the trial phase, sentencing must accurately reflect the community's attitude toward the misconduct of which the offender has been adjudged guilty, and thereby ratify and reinforce community values. Marking, on the other hand, the threshold of the sanction or treatment phase, however, and largely defining its character and length, sentencing must also look to the offender's rehabilitation, to his restoration as a functioning, productive, responsible member of the community."

[9] In 1945, Fed. Rule Crim. Proc. 32 (c)(2) provided, as it does today:

"The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court."

All amendments to Rule 32 (c) since its promulgation by this Court have had one of two purposes: first, to increase judicial use of presentence reports in the sentencing decision and, second, to assist the sentencing judge in assessing the accuracy of the information contained in them. See Advisory Committee's Notes on Fed. Rule Crim. Proc. 32 and amend-

Constitutional challenges were leveled at judicial reliance on such information, however. In *Williams* v. *New York*, a jury convicted the defendant of murder but recommended a life sentence. The sentencing judge, partly on the basis of information not known to the jury but contained in a presentence report, imposed the death penalty. The defendant argued that this procedure deprived him of his federal constitutional right to confront and cross-examine those supplying information to the probation officer and, through him, to the sentencing judge. The Court rejected this argument. It noted that traditionally "a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.*, at 246. "And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information," *id.*, at 247; indeed, "[t]o deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation." *Id.*, at 249–250. Accordingly, the sentencing judge was held not to have acted unconstitutionally in considering either the defendant's participation in criminal conduct for which he had not been convicted or information secured by the probation investigator that the defendant was a "menace to society." See *id.*, at 244.

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ments, 18 U. S. C. App., pp. 1456–1460 (1976 ed.); 8A J. Moore, Federal Practice ¶¶ 32.03 [1]–[4] (1975). To the same end, Congress, between 1973 and 1975, authorized 828 additional probation officers—an increase of more than 125%. The increase from 1971 to date has been more than 275%.

Title 18 U. S. C. §§ 4205 (c)–(d) (1976 ed.) provide district courts with a means, in addition to the presentence report, of acquiring information relevant to sentencing: commitment of the offender for up to six months to enable the Director of the Bureau of Prisons to make "a complete study . . . of the prisoner."

Of course, a sentencing judge is not limited to the often far-ranging material compiled in a presentence report. "[B]efore making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U. S. 443, 446 (1972). Congress recently reaffirmed this fundamental sentencing principle by enacting 18 U. S. C. § 3577 (1976 ed.): [10]

> "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Thus, we have acknowledged that a sentencing authority may legitimately consider the evidence heard during trial, as well as the demeanor of the accused. *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 32 (1973). More to the point presented in this case, one serious study has concluded that the trial judge's "opportunity to observe the defendant, particularly if he chose to take the stand in his defense, can often provide useful insights into an appropriate disposition." ABA Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 5.1, p. 232 (App. Draft 1968).

A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing. Soon after

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[10] Title 18 U. S. C. § 3577 (1976 ed.) was enacted as a part of § 1001 of the Organized Crime Control Act of 1970, a section designed to impose extended terms of imprisonment on dangerous special offenders, *i. e.*, the habitual, professional, or organized crime offender. The House Report on the 1970 Act, by way of explanation of what is now § 3577, cites this Court's decision in *Williams* v. *New York*. H. R. Rep. No. 91–1549, p. 63 (1970); see also S. Rep. No. 91–617, p. 167 (1969).

Williams was decided, the Tenth Circuit concluded that "the attitude of a convicted defendant with respect to his willingness to commit a serious crime [perjury] . . . is a proper matter to consider in determining what sentence shall be imposed within the limitations fixed by statute." *Humes* v. *United States*, 186 F. 2d 875, 878 (1951). The Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have since agreed. See n. 3, *supra*. Judge Marvin Frankel's analysis for the Second Circuit is persuasive:

> "The effort to appraise 'character' is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training. Yet it is in our existing scheme of sentencing one clue to the rational exercise of discretion. If the notion of 'repentance' is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes. . . . Impressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society—are, for better or worse, central factors to be appraised under our theory of 'individualized' sentencing. The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia." *United States* v. *Hendrix*, 505 F. 2d 1233, 1236 (1974).

Only one Circuit has directly rejected the probative value of the defendant's false testimony in his own defense. In *Scott* v. *United States*, 135 U. S. App. D. C. 377, 382, 419 F. 2d 264, 269 (1969), the court argued that

> "the peculiar pressures placed upon a defendant threatened with jail and the stigma of conviction make his

> willingness to deny the crime an unpromising test of his prospects for rehabilitation if guilty. It is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man may quite sincerely repent his crime but yet, driven by the urge to remain free, may protest his innocence in a court of law."

See also *United States* v. *Moore*, 484 F. 2d 1284, 1288 (CA4 1973) (Craven, J., concurring). The *Scott* rationale rests not only on the realism of the psychological pressures on a defendant in the dock—which we can grant—but also on a deterministic view of human conduct that is inconsistent with the underlying precepts of our criminal justice system. A "universal and persistent" foundation stone in our system of law, and particularly in our approach to punishment, sentencing, and incarceration, is the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette* v. *United States*, 342 U. S. 246, 250 (1952). See also *Blocker* v. *United States*, 110 U. S. App. D. C. 41, 53, 288 F. 2d 853, 865 (1961) (opinion concurring in result). Given that long-accepted view of the "ability and duty of the normal individual to choose," we must conclude that the defendant's readiness to lie under oath—especially when, as here, the trial court finds the lie to be flagrant—may be deemed probative of his prospects for rehabilitation.

III

Against this background we evaluate Grayson's constitutional argument that the District Court's sentence constitutes punishment for the crime of perjury for which he has not been indicted, tried, or convicted by due process. A second argument is that permitting consideration of perjury will "chill" defendants from exercising their right to testify on their own behalf.

A

In his due process argument, Grayson does not contend directly that the District Court had an impermissible purpose in considering his perjury and selecting the sentence. Rather, he argues that this Court, in order to preserve due process rights, not only must prohibit the impermissible sentencing practice of incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution but also must prohibit the otherwise *permissible* practice of considering a defendant's untruthfulness for the purpose of illuminating his need for rehabilitation and society's need for protection. He presents two interrelated reasons. The effect of both permissible and impermissible sentencing practices may be the same: additional time in prison. Further, it is virtually impossible, he contends, to identify and establish the impermissible practice. We find these reasons insufficient justification for prohibiting what the Court and the Congress have declared appropriate judicial conduct.

First, the evolutionary history of sentencing, set out in Part II, demonstrates that it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision. The "parlous" effort to appraise "character," *United States* v. *Hendrix*, *supra*, at 1236, degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning "every aspect of a defendant's life." *Williams* v. *New York*, 337 U. S., at 250. The Government's interest, as well as the offender's, in avoiding irrationality is of the highest order. That interest more than justifies the risk that Grayson asserts is present when a sentencing judge considers a defendant's untruthfulness under oath.

Second, in our view, *Williams* fully supports consideration

of such conduct in sentencing. There the Court permitted the sentencing judge to consider the offender's history of prior antisocial conduct, including burglaries for which he had not been duly convicted. This it did despite the risk that the judge might use his knowledge of the offender's prior crimes for an improper purpose.

Third, the efficacy of Grayson's suggested "exclusionary rule" is open to serious doubt. No rule of law, even one garbed in constitutional terms, can prevent improper use of firsthand observations of perjury. The integrity of the judges, and their fidelity to their oaths of office, necessarily provide the only, and in our view adequate, assurance against that.

B

Grayson's argument that judicial consideration of his conduct at trial impermissibly "chills" a defendant's statutory right, 18 U. S. C. § 3481 (1976 ed.), and perhaps a constitutional right to testify on his own behalf is without basis. The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath—unless we are to say that the oath is mere ritual without meaning. This view of the right involved is confirmed by the unquestioned constitutionality of perjury statutes, which punish those who willfully give false testimony. See, *e. g.*, 18 U. S. C. § 1621 (1976 ed.); cf. *United States* v. *Wong*, 431 U. S. 174 (1977). Further support for this is found in an important limitation on a defendant's right to the assistance of counsel: Counsel ethically cannot assist his client in presenting what the attorney has reason to believe is false testimony. See *Holloway* v. *Arkansas*, 435 U. S. 475, 480 n. 4 (1978); ABA Project on Standards for Criminal Justice, The Defense Function § 7.7 (c), p. 133 (Compilation 1974). Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.

Grayson's further argument that the sentencing practice challenged here will inhibit exercise of the right to testify truthfully is entirely frivolous. That argument misapprehends the nature and scope of the practice we find permissible. Nothing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine—with a consciousness of the frailty of human judgment—whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society. Awareness of such a process realistically cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf.

Accordingly, we reverse the judgment of the Court of Appeals and remand for reinstatement of the sentence of the District Court.

Reversed and remanded.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court begins its consideration of this case, *ante*, at 42, with the assumption that the respondent gave false testimony at his trial. But there has been no determination that his testimony was false. This respondent was given a greater sentence than he would otherwise have received—how much greater we have no way of knowing—solely because a single judge *thought* that he had not testified truthfully.[1] In es-

[1] We know this only because of the trial judge's laudable explication of his reasons for imposing the sentence in this case. In many cases it would be impossible to discern whether a sentencing judge had been influenced by

sence, the Court holds today that *whenever* a defendant testifies in his own behalf and is found guilty, he opens himself to the possibility of an enhanced sentence. Such a sentence is nothing more or less than a penalty imposed on the defendant's exercise of his constitutional and statutory rights to plead not guilty and to testify in his own behalf.[2]

It does not change matters to say that the enhanced sentence merely reflects the defendant's "prospects for rehabilitation" rather than an additional punishment for testifying falsely.[3] The fact remains that all defendants who choose to testify, and only those who do so, face the very real pros-

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his belief that the defendant had not testified truthfully, since there is no requirement that reasons be given. But that fact does not argue against correcting an erroneous sentencing policy that is apparent on the face of the record. Cf. *Bordenkircher* v. *Hayes*, 434 U. S. 357, 372 (POWELL, J., dissenting). As the Court notes, *ante*, at 54, "[t]he integrity of the judges" is a sufficient guarantee that they will not consciously consider factors that have been declared impermissible, even if the reasons for imposing a particular sentence are not stated on the record.

[2] The accused in a federal case has an absolute constitutional right to plead not guilty, and if he does elect to go to trial an absolute statutory right to testify in his own behalf. 18 U. S. C. § 3481 (1976 ed.). I cannot believe that the latter is not also a constitutional right, for the right of a defendant under the Sixth and Fourteenth Amendments "to make his defense," *Faretta* v. *California*, 422 U. S. 806, 819, surely must encompass the right to testify in his own behalf. See *Ferguson* v. *Georgia*, 365 U. S. 570, 602 (Clark, J., concurring).

[3] Indeed, without doubting the sincerity of trial judges one may doubt whether the single incident of a defendant's trial testimony could ever alter the assessment of rehabilitative prospects so drastically as to justify a perceptibly greater sentence. A sentencing judge has before him a presentence report, compiled by trained personnel, that is designed to paint as complete a picture of the defendant's life and character as is possible. If the defendant's suspected perjury is consistent with the evaluation of the report, its impact on the rehabilitative assessment must be minimal. If, on the other hand, it suggests such a markedly different character that different sentencing treatment seems appropriate, the defendant is *effectively* being punished for perjury without even the barest rudiments of due process.

pect of a greater sentence based upon the trial judge's unreviewable perception that the testimony was untruthful. The Court prescribes no limitations or safeguards to minimize a defendant's rational fear that his truthful testimony will be perceived as false.[4] Indeed, encumbrance of the sentencing process with the collateral inquiries necessary to provide such assurance would be both pragmatically unworkable and theoretically inconsistent with the assumption that the trial judge is merely considering one more piece of information in his overall evaluation of the defendant's prospects for rehabilitation. But without such safeguards I fail to see how the Court can dismiss as "frivolous" the argument that this sentencing practice will "inhibit exercise of the right to testify truthfully," *ante*, at 55.

A defendant's decision to testify may be inhibited by a number of considerations, such as the possibility that damaging evidence not otherwise admissible will be admitted to impeach his credibility. These constraints arise solely from the fact that the defendant is quite properly treated like any other witness who testifies at trial. But the practice that the Court approves today actually places the defendant at a disadvantage, as compared with any other witness at trial, simply because he is the defendant. Other witnesses risk

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[4] For example, the dissenting judge in the Court of Appeals in this case suggested that a sentencing judge "should consider his independent evaluation of the testimony and behavior of the defendant only when he is convinced beyond a reasonable doubt that the defendant intentionally lied on material issues of fact . . . [and] the falsity of the defendant's testimony [is] necessarily established by the finding of guilt." 550 F. 2d 103, 114 (Rosenn, J., dissenting). Contrary to Judge Rosenn, I do not believe that the latter requirement was met in this case. The jury could have believed Grayson's entire story but concluded, in the words of the trial judge's instructions on the defense of duress, that "an ordinary man" would *not* "have felt it necessary to leave the Allenwood Prison Camp when faced with the same degree of compulsion, coercion or duress as the Defendant was faced with in this case."

punishment for perjury only upon indictment and conviction in accord with the full protections of the Constitution. Only the defendant himself, whose testimony is likely to be of critical importance to his defense,[5] faces the additional risk that the disbelief of a single listener will itself result in time in prison.

The minimal contribution that the defendant's possibly untruthful testimony might make to an overall assessment of his potential for rehabilitation, see n. 3, *supra*, cannot justify imposing this additional burden on his right to testify in his own behalf. I do not believe that a sentencing judge's discretion to consider a wide range of information in arriving at an appropriate sentence, *Williams* v. *New York*, 337 U. S. 241, allows him to mete out additional punishment to the defendant simply because of his personal belief that the defendant did not testify truthfully at the trial.

Accordingly, I would affirm the judgment of the Court of Appeals.

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[5] Notwithstanding the standard instruction that the jury is not to draw any adverse inference from the defendant's failure to testify, "a defendant who does not take the stand will probably fatally prejudice his chances of acquittal." Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L. J. 204, 212 n. 36 (1956).

Syllabus

DUKE POWER CO. *v.* CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

No. 77-262. Argued March 20, 1978—Decided June 26, 1978*

The Price-Anderson Act (Act), having the dual purpose of protecting the public and encouraging the development of the nuclear energy industry, imposes a $560 million limitation on liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants, requires those indemnified by the $560 million fund established under the Act to waive all legal defenses in the event of a substantial nuclear accident, and further provides that in the event of a nuclear accident involving damages in excess of the amount of aggregate liability Congress "will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." Appellant Duke Power Co. (Duke), an investor-owned public utility which is constructing nuclear power plants in North and South Carolina, and appellant Nuclear Regulatory Commission (NRC), were sued by appellees (an environmental organization, a labor union, and a number of individuals who live near the plants in question) who sought a declaration that the Act is unconstitutional. After finding, *inter alia*, that the "immediate" adverse effects upon appellees resulting from the operation of the plants included thermal pollution of lakes in the vicinity, and emission of non-natural radiation into appellees' environment, and also that there was a "substantial likelihood" that Duke would not be able to complete construction and maintain operation of the plants "but for" the protection provided by the Act, the District Court held that appellees had standing to challenge the Act's constitutionality and that their claim could be properly adjudicated. The court then went on to hold that the Act violated the Due Process Clause of the Fifth Amendment because the amount of recovery is not rationally related to the potential losses, the Act tends to encourage irresponsibility in matters of safety and environmental protection, and there is no *quid pro quo* for the liability limitation; and the Act also offended the equal

*Together with No. 77-375, *United States Nuclear Regulatory Commission et al.* v. *Carolina Environmental Study Group, Inc., et al.*, also on appeal from the same court.

protection component of the Fifth Amendment by forcing the victims of nuclear incidents to bear the burden of injury, whereas society as a whole benefits from the existence and development of nuclear power. *Held:*

1. The District Court had jurisdiction over appellees' complaint against the NRC under 28 U. S. C. § 1331 (a) (1976 ed.) rather than § 1337, the jurisdictional base pleaded. The complaint, fairly read, raised two basic challenges to the Act, both of which are derived from the Fifth Amendment. Appellees' cause of action against the NRC directly under the Constitution is sufficiently substantial to sustain jurisdiction; the further question of whether such a cause of action is to be generally recognized need not be decided on this record. Pp. 68–72.

2. Appellees have standing to challenge the Act's constitutionality. That several of the "immediate" adverse effects of construction of the plants were found to harm appellees is sufficient to satisfy the "injury in fact" prong of the constitutional requirement for standing. And the finding as to the "but for" causal connection between the Act and the construction of the plants satisfies the second prong of the constitutional test for standing, that the exercise of the court's remedial powers would redress the claimed injuries. Pp. 72–81.

3. The constitutional challenges to the Act are ripe for adjudication, since all parties would be adversely affected by a decision to defer definitive resolution of the constitutional validity *vel non* of the Act. To the extent that "issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,'" *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 138 (1974), the fact that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested satisfies this requirement. Pp. 81–82.

4. The Act does not violate the Due Process Clause of the Fifth Amendment. Pp. 82–94.

(a) The record supports the need for the imposition of a statutory limit on liability to encourage private industry participation and hence bears a rational relationship to Congress' concern for stimulating private industry's involvement in the production of nuclear electric energy. P. 84.

(b) Assuming, *arguendo*, that the $560 million fund would not insure full recovery in all conceivable circumstances, it does not follow that the liability limitation is therefore irrational and violative of due process. When appraised in light of the extremely remote possibility of an accident in which liability would exceed the statutory limit and Congress' commitment to "take whatever action is deemed necessary and appro-

priate to protect the public from the consequences of" a disaster of such proportions, the congressional decision to fix a $560 million ceiling is within permissible limits and not violative of due process. Pp. 84–87.

(c) The District Court's finding that the Act tends to encourage irresponsibility in matters of safety and environmental protection cannot withstand careful scrutiny, since nothing in the liability-limitation provision undermines or alters the rigor and integrity of the process involved in the review of applications for a license to construct or operate a nuclear power plant, and since, in the event of a nuclear accident the utility itself would probably suffer the largest damages. P. 87.

(d) The Act provides a reasonably just substitute for the common-law or state tort law remedies it replaces, and nothing more is required by the Due Process Clause. The congressional *assurance* of a $560 million fund for recovery, accompanied by the statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear accident, is a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer whose resources might well be exhausted at an early stage. And, at the minimum, the statutorily mandated waiver of defenses establishes at the threshold the right of injured parties to compensation without proof of fault and eliminates the burden of delay and uncertainty that would follow from the need to litigate the question of liability after an accident. Pp. 87–93.

(e) There is no equal protection violation, since the general rationality of the Act's liability limitation, particularly with reference to the congressional purpose of encouraging private participation in the exploitation of nuclear energy, is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes. Pp. 93–94.

5. The Act does not withdraw the Tucker Act remedy, 28 U. S. C. § 1491, and thus appellees' challenge under the Just Compensation Clause must fail. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day. P. 94 n. 39.

431 F. Supp. 203, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed an opinion concurring in the result, *post*, p. 94. REHNQUIST, J., filed an opinion concurring in the judgment, in which STEVENS, J., joined, *post*, p. 95. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 102.

Steve C. Griffith, Jr., argued the cause for appellant in No. 77–262. With him on the briefs were *Joseph B. Knotts, Jr.*, and *William Larry Porter*. *Solicitor General McCree* argued the cause for appellants in No. 77–375. With him on the briefs were *Assistant Attorney General Babcock, Deputy Solicitor General Jones, Harriet S. Shapiro, Robert E. Kopp, Thomas G. Wilson, Jerome Nelson*, and *Stephen F. Eilperin*.

William B. Schultz argued the cause for appellees in both cases. With him on the brief were *Alan B. Morrison, George Daly, Norman B. Smith*, and *Jonathan R. Harkavy*.†

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These appeals present the question of whether Congress may, consistent with the Constitution, impose a limitation on

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†Briefs of *amici curiae* urging reversal were filed by *Philip B. Kurland* and *William F. Steigman* for the American Hospital Assn. et al.; by *Northcutt Ely, Frederick H. Ritts*, and *Robert F. Pietrowski, Jr.*, for the American Public Power Assn.; by *Sutton Keany* for the Association of the Bar of the City of New York; by *Arthur W. Murphy* and *Harvey S. Price* for the Atomic Industrial Forum, Inc.; by *Harry A. Rissetto, O. S. Hiestand*, and *Alvin G. Kalmanson* for Babcock and Wilcox Co.; by *Raymond L. Falls, Jr.*, and *Michael P. Tierney* for Combustion Engineering, Inc.; by *Cameron F. MacRae, Leonard M. Trosten, Harry H. Voigt*, and *Eugene R. Fidell* for the Edison Electric Institute; by *William C. Wise* and *Robert Weinberg* for the National Rural Electric Cooperative Assn. et al.; by *Richard A. Whiting* and *William C. Kelly, Jr.*, for the Nuclear Energy Liability Property Insurance Assn. et al.; by *Ronald Zumbrun, John H. Findley, Albert Ferri, Jr.*, and *Donald C. Simpson* for the Pacific Legal Foundation; and by *Ben B. Blackburn* and *Wayne T. Elliott* for the Southeastern Legal Foundation.

William J. Brown, Attorney General, and *E. Dennis Murchnicki*, Assistant Attorney General, filed a brief for the State of Ohio as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Bronson C. La Follette*, Attorney General of Wisconsin, and *Patrick Walsh*, Assistant Attorney General, *Eldon G. Kaul*, Assistant Attorney General of Minnesota, and *Carl Valore, Jr.*, for the State of Wisconsin et al.; and by *Herbert H. Brown, Gilbert*

liability for nuclear accidents resulting from the operation of private nuclear power plants licensed by the Federal Government.

I

A

When Congress passed the Atomic Energy Act of 1946, it contemplated that the development of nuclear power would be a Government monopoly. See Act of Aug. 1, 1946, ch. 724, 60 Stat. 755. Within a decade, however, Congress concluded that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. See H. R. Rep. No. 2181, 83d Cong., 2d Sess., 1–11 (1954). The Atomic Energy Act of 1954, Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, as amended, 42 U. S. C. §§ 2011–2281 (1970 ed. and Supp. V), implemented this policy decision, providing for licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under strict supervision by the Atomic Energy Commission (AEC).[1] See *Power Reactor Development Co.* v. *Electrical Workers,* 367 U. S. 396 (1961), rev'g and remanding 108 U. S. App. D. C. 97, 280 F. 2d 645 (1960).

Private industry responded to the Atomic Energy Act of 1954 with the development of an experimental power plant constructed under the auspices of a consortium of interested companies. It soon became apparent that profits from the private exploitation of atomic energy were uncertain and the accompanying risks substantial. See Green, Nuclear Power:

C. Miller, and *Lawrence Coe Lanpher* for the Resources Agency, State of California.

[1] Under the terms of the Energy Reorganization Act of 1974, 42 U. S. C. § 5801 *et seq.* (1970 ed., Supp. V), the Nuclear Regulatory Commission (NRC) has now replaced the AEC as the licensing and regulatory authority.

Risk, Liability, and Indemnity, 71 Mich. L. Rev. 479–481 (1973) (Green). Although the AEC offered incentives to encourage investment, there remained in the path of the private nuclear power industry various problems—the risk of potentially vast liability in the event of a nuclear accident of a sizable magnitude being the major obstacle. Notwithstanding comprehensive testing and study, the uniqueness of this form of energy production made it impossible totally to rule out the risk of a major nuclear accident resulting in extensive damage. Private industry and the AEC were confident that such a disaster would not occur, but the very uniqueness of nuclear power meant that the possibility remained, and the potential liability dwarfed the ability of the industry and private insurance companies to absorb the risk. See Hearings before the Joint Committee on Atomic Energy on Government Indemnity for Private Licensees and AEC Contractors Against Reactor Hazards, 84th Cong., 2d Sess., 122–124 (1956). Thus, while repeatedly stressing that the risk of a major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation. *Id.*, at 9, 109–110, 115, 120, 136–137, 148, 181, 195, and 240.

Congress responded in 1957 by passing the Price-Anderson Act, 71 Stat. 576, 42 U. S. C. § 2210 (1970 ed. and Supp. V). The Act had the dual purpose of "protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry." 42 U. S. C. § 2012 (i). In its original form, the Act limited the aggregate liability for a single nuclear incident [2] to $500 million plus the amount of liability insurance

[2] A "nuclear incident" is defined as "any occurrence . . . within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material . . . ." 42 U. S. C. § 2014 (q).

available on the private market—some $60 million in 1957. The nuclear industry was required to purchase the maximum available amount of privately underwritten public liability insurance, and the Act provided that if damages from a nuclear disaster exceeded the amount of that private insurance coverage, the Federal Government would indemnify the licensee and other "persons indemnified" [3] in an amount not to exceed $500 million. Thus, the actual ceiling on liability was the amount of private insurance coverage plus the Government's indemnification obligation which totaled $560 million.

Since its enactment, the Act has been twice amended, the first occasion being on the eve of its expiration in 1966.[4] These amendments extended the basic liability-limitation provisions for another 10 years, and added a provision which had the effect of requiring those indemnified under the Act to waive all legal defenses in the event of a substantial nuclear accident.[5] This provision was based on a congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions—strict liability—was needed. A waiver of defenses was thought to be the preferable approach since it entailed less

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[3] "The term 'person indemnified' means (1) with respect to a nuclear incident occurring within the United States . . . the person with whom an indemnity agreement is executed and any other person who may be liable for public liability . . . ." 42 U. S. C. § 2014 (t).

[4] By the terms of the Act as originally passed, it was only applicable to licenses issued between August 30, 1954, and August 1, 1967. § 4, 71 Stat. 576, as amended, 42 U. S. C. § 2210 (e).

[5] The waiver provision is incorporated in the indemnity agreement. The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of risk all are waived in the event of an extraordinary nuclear occurrence, as are, to a limited degree, defenses based on certain short state statutes of limitations. 80 Stat. 891, 42 U. S. C. § 2210 (n)(1). See also 10 CFR §§ 140.81 to 140.85, 140.91 to 140.92 (1977).

interference with state tort law than would the enactment of a federal statute prescribing strict liability.[6] See S. Rep. No. 1605, 89th Cong., 2d Sess., 6–10 (1966).

In 1975, Congress again extended the Act's coverage until 1987, and continued the $560 million limitation on liability. However a new provision was added requiring, in the event of a nuclear incident, each of the 60 or more reactor owners to contribute between $2 and $5 million toward the cost of compensating victims.[7] 42 U. S. C. § 2210 (b) (1970 ed., Supp. V). Since the liability ceiling remained at the same level, the effect of the "deferred premium" provision was to reduce the Federal Government's contribution to the liability pool.[8] In its amendments to the Act in 1975, Congress also explicitly provided that "in the event of a nuclear incident involving damages in excess of [the] amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a

[6] The Act was also amended in 1966 to provide for the transfer of all claims arising out of a nuclear incident to a single federal district court. 42 U. S. C. § 2210 (n) (2). If the court finds that liability may exceed the liability limitation of the Act, immediate payments to injured parties are limited to 15% of the liability limitation until the court approves a plan of distribution to insure equitable treatment of all parties. § 2210 (*o*) (1970 ed. and Supp. V).

[7] The NRC, which was empowered by the 1975 amendments to choose a figure in the $2–$5 million range, has set the assessment at $5 million. 42 Fed. Reg. 46 (1977).

[8] As the number of reactors increases, the $5 million deferred premium in itself will yield a fund exceeding the present liability ceiling. For example, it is predicted that by 1985 there will be a maximum of 138 reactors operating, see Executive Office of the President, The National Energy Plan 71 (1977), which would produce $690 million in addition to whatever insurance is available from the private insurance market. Under the Act, the liability ceiling automatically increases to a level equal to the amount of primary and secondary (deferred premium) insurance coverage when the amount of such coverage exceeds the $560 million figure. 42 U. S. C. § 2210 (e) (1970 ed., Supp. V).

disaster of such magnitude . . . ." 42 U. S. C. § 2210 (e) (1970 ed., Supp. V).

Under the Price-Anderson Act as it presently stands, liability in the event of a nuclear incident causing damages of $560 million or more would be spread as follows: $315 million would be paid from contributions by the licensees of the 63 private operating nuclear power plants; $140 million would come from private insurance (the maximum now available); the remainder of $105 million would be borne by the Federal Government.[9]

B

Appellant in No. 77–262, Duke Power Co., is an investor-owned public utility which is constructing one nuclear power plant in North Carolina and one in South Carolina. Duke Power, along with the NRC, was sued by appellees, two organizations—Carolina Environmental Study Group and the Catawba Central Labor Union—and 40 individuals who live within close proximity to the planned facilities. The action was commenced in 1973, and sought, among other relief, a declaration that the Price-Anderson Act is unconstitutional.[10]

After the parties had engaged in extensive discovery, the District Court held an evidentiary hearing on the questions of whether the issues were ripe for adjudication and whether

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[9] Appellees' expert witness on insurance testified in the District Court that homeowners were unable to purchase insurance against nuclear catastrophes because "the nuclear industry has essentially absorbed the entire capacity of the private insurance markets in their need for property and liability insurance." App. 293–294.

[10] The complaint also sought review of the AEC's decision to grant a construction permit for one of the plants. During the pendency of this action, however, the United States Court of Appeals for the District of Columbia Circuit decided that the AEC had properly issued the permits. *Carolina Environmental Study Group* v. *United States*, 166 U. S. App. D. C. 416, 510 F. 2d 796 (1975). Accordingly, the District Court dismissed all counts of the complaint except those relating to the Price-Anderson Act's constitutionality.

appellees had standing to challenge the constitutionality of the Act. That court determined that appellees had standing and that their claim could properly be adjudicated. The District Court went on to hold that the Price-Anderson Act was unconstitutional in two respects: (a) it violated the Due Process Clause of the Fifth Amendment because it allowed injuries to occur without assuring adequate compensation to the victims; (b) the Act offended the equal protection component of the Fifth Amendment by forcing the victims of nuclear incidents to bear the burden of injury, whereas society as a whole benefits from the existence and development of nuclear power.

We noted probable jurisdiction [11] in these appeals, 434 U. S. 937 (1977), and we now reverse.

II

As a threshold matter, we must address the question of whether the District Court had subject-matter jurisdiction over appellees' claims, despite the fact that none of the parties raised this issue and the District Court did not consider it. See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737, 740 (1976). Appellees' complaint alleges jurisdiction under 28 U. S. C. § 1337 (1976 ed.), which provides for original jurisdiction in the district courts over "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Our reading of the pleadings,[12] however, indicates that

[11] Our jurisdiction was invoked under 28 U. S. C. § 1252 (1976 ed.), which provides for a direct appeal to this Court from any decision invalidating an Act of Congress in any suit to which the United States, its agencies, officers, or employees are parties.

[12] The complaint provides in relevant part:

"19. Since the Price-Anderson Act provides victims of a nuclear disaster no benefit while at the same time limiting their right to recover for their losses to approximately 2½% of such losses, the operation of the $500 million limitation would, in the event of a nuclear disaster, deprive the

appellees' claims do not "arise under" the Price-Anderson Act as that statutory language has been interpreted in prior decisions. See *Peyton* v. *Railway Express Agency*, 316 U. S. 350, 353 (1942).

Specifically, as we read the complaint, appellees are making two basic challenges to the Act—both of which find their moorings in the Fifth Amendment. First, appellees contend that the Due Process Clause protects them against arbitrary governmental action adversely affecting their property rights and that the Price-Anderson Act—which both creates the source of the underlying injury and limits the recovery therefor—constitutes such arbitrary action. And second, they are contending that in the event of a nuclear accident their property would be "taken" without any assurance of just compensation. The Price-Anderson Act is the instrument of the taking since on this record, without it, there would be no power plants and no possibility of an accident. Implicit in the complaint is also the assumption that there exists a cause of action directly under the Constitution to vindicate appellees' federal rights through a suit against the NRC, the executive agency charged with enforcement and administration of the allegedly unconstitutional statute.[13] Appellees' right to relief

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persons injured by such a disaster of property rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States." App. 32.

[13] MR. JUSTICE REHNQUIST would read the complaint, insofar as it alleges a denial of due process, as stating a claim only against Duke Power under North Carolina law. Under such a construction of the complaint, the question of the constitutionality of the Price-Anderson Act would emerge only in anticipation of a defense to appellees' state-law claims and thus would not support federal jurisdiction under the "well-pleaded" complaint rule regardless of the jurisdictional statute relied upon. See *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908). We conclude that the complaint is more fairly read as stating a claim against the NRC directly under the Due Process Clause of the Fifth Amendment. See n. 12, *supra*. On this view, the "well-pleaded" complaint rule poses no bar to the assertion of jurisdiction. Appellees' claim under the Due Process Clause

thus depends not on the interpretation or construction of the Price-Anderson Act itself, but instead "upon the construction or application of the Constitution," *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 199 (1921). Hence, if there exists jurisdiction to hear appellees' claims at all, it must be derived from 28 U. S. C. § 1331 (a) (1976 ed.), the general federal-question statute, rather than from § 1337—the jurisdictional base pleaded.[14]

For purposes of determining whether jurisdiction exists under § 1331 (a) to resolve appellees' claims, it is not necessary to decide whether appellees' alleged cause of action against the NRC based directly on the Constitution is in fact a cause of action "on which [appellees] could actually recover." *Bell* v. *Hood*, 327 U. S. 678, 682 (1946). Instead, the test is whether " 'the cause of action alleged is *so patently without merit* as to justify . . . the court's dismissal for want of jurisdiction.' " *Hagans* v. *Lavine*, 415 U. S. 528, 542–543 (1974), quoting *Bell* v. *Hood*, *supra*, at 683. (Emphasis added.) See also *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 666 (1974) (test is whether right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this

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is an essential ingredient of a well-pleaded complaint asserting a right under the Constitution and is not simply a claim made in anticipation of a defense to be raised in an action having its origin in state law. See also n. 26, *infra*.

[14] Previously § 1331 (a) required a minimum amount in controversy in all suits, but a 1976 amendment eliminated the jurisdictional amount requirement in actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub. L. 94–574 § 2, 90 Stat. 2721. Thus this action, at least as against the NRC, would seem clearly permitted by § 1331 (a) without specification of an amount in controversy. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 608 n. 6 (1978). Appellees' failure to assert § 1331 (a) as a basis for jurisdiction in their complaint is not fatal since the facts alleged are sufficient to support such jurisdiction. See 436 U. S., at 608 n. 6.

Court, or otherwise completely devoid of merit as not to involve a federal controversy"). In light of prior decisions, for example, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971) and *Hagans* v. *Lavine*, *supra*, as well as the general admonition that "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief," *Bell* v. *Hood*, *supra*, at 684, we conclude that appellees' allegations are sufficient to sustain jurisdiction under § 1331 (a).[15]

The further question of whether appellees' cause of action under the Constitution is one generally to be recognized need not be decided here. The question does not directly implicate our jurisdiction, see *Bell* v. *Hood*, *supra*, was not raised in the court below, was not briefed, and was not addressed during oral argument. As we noted last Term in a similar context, questions of this sort should not be resolved on such an inadequate record; leaving them unresolved is no bar to full consideration of the merits. See *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U. S. 274, 278–279 (1977). It is enough for present purposes that the claimed cause of action to vindicate appel-

[15] MR. JUSTICE REHNQUIST suggests that appellees' "taking" claim will not support jurisdiction under § 1331 (a), but instead that such a claim can be adjudicated only in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491 (1976 ed.). We disagree. Appellees are not seeking compensation for a taking, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgment that since the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional. As such, appellees' claim tracks quite closely that of the petitioners in the *Regional Rail Reorganization Act Cases*, 419 U. S. 102 (1974), which were brought under § 1331 as well as the Declaratory Judgment Act. See App. in *Regional Rail Reorganization Act Cases*, O. T. 1974, Nos. 74–165, 74–166, 74–167, 74–168, p. 161. While the Declaratory Judgment Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.

lees' constitutional rights is sufficiently substantial and colorable to sustain jurisdiction under § 1331 (a).[16]

III

The District Judge held four days of hearings on the questions of standing and ripeness; his factual findings form the basis for our analysis of these issues.

A

The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261 (1977). See also *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 41–42 (1976); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). Application of these constitutional standards to the factual findings of the District Court persuades us that the Art. III requisites for standing are satisfied by appellees.

We turn first to consider the kinds of injuries the District Court found the appellees suffered. It discerned two categories of effects which resulted from the operation of nuclear

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[16] We need not resolve the question of whether Duke Power is a proper party since jurisdiction over appellees' claims against the NRC is established, and Duke's presence or absence makes no material difference to either our consideration of the merits of the controversy or our authority to award the requested relief.

power plants in potentially dangerous proximity to appellees' living and working environment. The immediate effects included: (a) the production of small quantities of non-natural radiation which would invade the air and water; (b) a "sharp increase" in the temperature of two lakes presently used for recreational purposes resulting from the use of the lake waters to produce steam and to cool the reactor; (c) interference with the normal use of the waters of the Catawba River; (d) threatened reduction in property values of land neighboring the power plants; (e) "objectively reasonable" present fear and apprehension regarding the "effect of the increased radioactivity in air, land and water upon [appellees] and their property, and the genetic effects upon their descendants"; and (f) the continual threat of "an accident resulting in uncontrolled release of large or even small quantities of radioactive material" with no assurance of adequate compensation for the resultant damage. 431 F. Supp. 203, 209. Into a second category of potential effects were placed the damages "which may result from a core melt or other major accident in the operation of a reactor . . . ." *Id.*, at 209.[17]

For purposes of the present inquiry, we need not determine whether all the putative injuries identified by the District Court, particularly those based on the possibility of a nuclear accident and the present apprehension generated by this future uncertainty, are sufficiently concrete to satisfy constitutional requirements. Compare *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), with *United States* v. *SCRAP*, 412 U. S. 669 (1973). See also *Conservation Society of Southern Vermont* v. *AEC*, Civ. Action No. 19–72 (DC Apr. 17, 1975). It is enough that several of the "immediate" adverse effects were found to harm appellees. Certainly the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type

[17] For a detailed explanation of the nature and consequences of a core melt, see 431 F. Supp., at 206–207.

of harmful effect which has been deemed adequate in prior cases to satisfy the "injury in fact" standard. See *United States* v. *SCRAP, supra.* Cf. *Sierra Club* v. *Morton,* 405 U. S. 727, 734 (1972).[18] And the emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.[19]

The more difficult step in the standing inquiry is establishing that these injuries "fairly can be traced to the challenged action of the defendant," *Simon* v. *Eastern Ky. Welfare Rights Org., supra,* at 41, or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries. 426 U. S., at 43. The District Court discerned a "but for" causal connection between the Price-Anderson Act, which appellees challenged as unconstitutional, "and the construction of the nuclear plants which the [appellees] view as a threat to them." 431 F. Supp., at 219. Particularizing that causal link to the facts of the instant case, the District Court concluded that "there is a substantial likelihood that Duke would not be able to complete the construction and maintain the operation of the McGuire and Catawba Nuclear Plants

[18] "We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing . . . . Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . ." *Sierra Club* v. *Morton,* 405 U. S., at 734.

[19] It is argued that the District Court's findings on the question of injury in fact upon which we rely are clearly erroneous and should not be accepted as a predicate for standing. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395 (1948). Application of this standard to the factual findings of the District Court does not persuade us that they should not be accepted.

but for the protection provided by the Price-Anderson Act." *Id.*, at 220.

These findings, which, if accepted, would likely satisfy the second prong of the constitutional test for standing as elaborated in *Simon*,[20] are challenged on two grounds. First, it is argued that the evidence presented at the hearing, contrary to the conclusion reached by the District Court, indicated that the McGuire and Catawba nuclear plants would be completed and operated without the Price-Anderson Act's limitation on liability. And second, it is contended that the Price-Anderson Act is not, in some essential sense, the "but for" cause of the disputed nuclear power plants and resultant adverse effects since if the Act had not been passed Congress may well have chosen to pursue the nuclear program as a Government monopoly as it had from 1946 until 1954. We reject both of these arguments.

The District Court's finding of a "substantial likelihood" that the McGuire and Catawba nuclear plants would be neither completed nor operated absent the Price-Anderson Act rested in major part on the testimony of corporate officials before the Joint Committee on Atomic Energy (JCAE) in 1956–1957 when the Price-Anderson Act was first considered and again in 1975 when a second renewal was discussed. During the 1956–1957 hearings, industry spokesmen for the utilities and the producers of the various component parts of the power plants expressed a categorical unwillingness to participate in the development of nuclear power absent guarantees of a limitation on their liability. 431 F. Supp., at 215. See also

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[20] Our recent cases have required no more than a showing that there is a "substantial likelihood" that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 262 (1977), quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 38 (1976) ("MHDC has shown an injury to itself that is 'likely to be redressed by a favorable decision'"). See also *Warth* v. *Seldin*, 422 U. S. 490, 504, 506–507 (1975).

Green 486, 490–491.[21] By 1975, the tenor of the testimony had changed only slightly. While large utilities and producers were somewhat more equivocal about whether a failure to renew Price-Anderson would entail their leaving the industry, the smaller producers of component parts and architects and engineers—all of whom are essential to the building of the reactors and generating plants—considered renewal of the Act as the critical variable in determining their continued involvement with nuclear power. 431 F. Supp., at 216–217. Duke Power itself, in its letter to the Committee urging extension of the Act, cited recent experiences with suppliers and contractors who were requiring the inclusion of cancellation clauses in their contracts to take effect if the liability-limitation provisions were eliminated. *Id.*, at 217. And the Report of the JCAE, in discussing the need for renewal of the Act, stated:

> "Nuclear power plants now in the planning and design phases would not receive construction permits until about 1977–1978. Thus there is uncertainty as to whether these plants would receive protection in the form of Government indemnity. Reactor manufacturers and architect-engineers are already requiring escape clauses in their contracts to permit cancellation in the event some form of protection from unlimited potential liability is not provided. Action is required soon to prevent disruption in utility plans for nuclear power." H. R. Rep. No. 94–648, p. 7 (1975).

Nor was the testimony at the hearing in this case, evaluation of which is the primary responsibility of the trial judge, at odds with the impression drawn from the legislative history. The testimony of Executive Vice President Lee of Duke Power

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[21] Nor was the situation different in 1965–1966, when the first 10-year renewal of Price-Anderson was considered. See H. R. Rep. No. 883, 89th Cong., 1st Sess., 9 (1965). See generally Green 493.

simply echoed the views presented by Duke and others to Congress in 1975, that is, although some of the utilities themselves might be confident enough with respect to safety factors to proceed with nuclear power absent a liability limitation, the suppliers of critical parts and the utility shareholders could reasonably be expected to take a more cautious view.[22] Appellees presented expert testimony essentially to the same effect. Considering the documentary evidence and the testimony in the record, we cannot say we are left with "the definite and firm conviction that" the finding by the trial court of a substantial likelihood that the McGuire and Catawba nuclear power plants would be neither completed nor operated absent the Price-Anderson Act is clearly erroneous; and, hence, we are bound to accept it. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948).

The second attack on the District Court's finding of a causal link warrants only brief attention. Essentially the argument is, as we understand it, that Price-Anderson is not a "but for" cause of the injuries appellees claim since, if Price-Anderson had not been passed, the Government would have undertaken development of nuclear power on its own and the same injuries would likely have accrued to appellees from such Government-operated plants as from privately operated ones. Whatever the ultimate accuracy of this speculation, it is not responsive to the simple proposition that private power companies now do in fact operate the nuclear-powered generating plants in-

[22] "From what I know about nuclear power, it would be my recommendation that Duke proceed even in the absence of Price-Anderson. However, from the point of view of how others perceive nuclear power, there is some question about whether it would be a practical undertaking in the absence of the Act. . . . I have already been advised by several firms that the existence of Price-Anderson is required for them to be a supplier to our nuclear program . . . . If Price-Anderson did not exist, I would therefore have to evaluate the extent to which its absence caused disappearance of suppliers from the marketplace in arriving at my recommendation." App. 368–369.

juring appellees, and that their participation would not have occurred but for the enactment and implementation of the Price-Anderson Act. Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief.

B

It is further contended that in addition to proof of injury and of a causal link between such injury and the challenged conduct, appellees must demonstrate a connection between the injuries they claim and the constitutional rights being asserted. This nexus requirement is said to find its origin in *Flast* v. *Cohen*, 392 U. S. 83 (1968), where the general question of taxpayer standing was considered:

> "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.*, at 102.

See also *United States* v. *Richardson*, 418 U. S. 166, 174–175 (1974). Since the environmental and health injuries claimed by appellees are not directly related to the constitutional attack on the Price-Anderson Act, such injuries, the argument continues, cannot supply a predicate for standing.[23] We decline to accept this argument.

The major difficulty with the argument is that it implicitly assumes that the nexus requirement formulated in the context of taxpayer suits has general applicability in suits of all other types brought in the federal courts. No cases have been cited

[23] The only injury that would possess the required subject-matter nexus to the due process challenge is the injury that would result from a nuclear accident causing damages in excess of the liability limitation provisions of the Price-Anderson Act.

outside the context of taxpayer suits where we have demanded this type of subject-matter nexus between the right asserted and the injury alleged, and we are aware of none.[24] Instead, in *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 225 n. 15 (1974), we explicitly rejected such a broad compass for the *Flast* nexus requirement:

> "Looking 'to the substantive issues' which *Flast* stated to be both 'appropriate and necessary' in relation to taxpayer standing was for the express purpose of determining 'whether there is a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated.' 392 U. S., at 102. This step is not appropriate on a claim of citizen standing since the *Flast* nexus test is not applicable where the taxing and spending power is not challenged. . . ."

We continue to be of the same view and cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the "case or controversy" requirement of Art. III.[25]

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[24] In *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973), a nontaxpayer suit, reference was made to *Flast*'s nexus requirement in the course of denying appellant's standing to challenge the nonenforcement of Texas' desertion and nonsupport statute. Upon careful reading, however, it is clear that standing was denied not because of the absence of a subject-matter nexus between the injury asserted and the constitutional claim, but instead because of the unlikelihood that the relief requested would redress appellant's claimed injury. *Id.*, at 618. This case thus provides no qualitative support for the broader application of *Flast*'s principles which appellants appear to advocate. Cf. Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 660–662 (1973).

[25] Both at the time of its formulation, see *Flast* v. *Cohen*, 392 U. S., at 120, 130–131 (Harlan J., dissenting), and more recently, see *United States* v. *Richardson*, 418 U. S. 166, 181, 196 n. 18 (1974) (POWELL, J., concurring), there have been questions as to whether the nexus require-

Our prior cases have, however, acknowledged "other limits on the class of persons who may invoke the courts' decisional and remedial powers," *Warth* v. *Seldin*, 422 U. S., at 499, which derive from general prudential concerns "about the proper—and properly limited—role of the courts in a democratic society." *Id.*, at 498. See also *Schlesinger* v. *Reservists Comm. to Stop the War*, *supra*, at 221–227. Thus, we have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure. See *United States* v. *Richardson*, *supra*. We have also narrowly limited the circumstances in which one party will be given standing to assert the legal rights of another. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, *supra*, at 499. See also *United States* v. *Raines*, 362 U. S. 17 (1960). This limitation on third-party standing arguably suggests a connection between the claimed injury and the right asserted bearing some resemblance to the nexus requirement now urged upon us.

There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them. See *Singleton* v. *Wulff*, 428 U. S. 106, 113–114 (1976). We do not, however, find these reasons a satisfactory predicate for applying this limitation or a similar nexus requirement to all cases as a matter of course. Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be

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ment, even in the context of taxpayers' suits, is constitutionally mandated or is instead simply a prudential limitation.

prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met. See, *e. g., Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977).

We conclude that appellees have standing to challenge the constitutionality of the Price-Anderson Act.[26]

C

The question of the ripeness of the constitutional challenges raised by appellees need not long detain us. To the extent that "issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' " *Regional Rail Reorganization Act Cases*, 419 U. S., at 138, our conclusion that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested would appear to satisfy this requirement.

The prudential considerations embodied in the ripeness doctrine also argue strongly for a prompt resolution of the claims presented. Although it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this

[26] MR. JUSTICE REHNQUIST undertakes to sever the action of the NRC in executing indemnity agreements under the Act from the Act's alleged constitutional infirmities—particularly the liability limitation provisions. Careful examination of the statutory mechanism indicates that such a separation simply cannot be sustained. The execution of the indemnification agreements by the NRC triggers the statutory ceiling on liability which, in terms, applies only to "persons indemnified." See 42 U. S. C. § 2210 (e) (1970 ed., Supp. V). Thus, absent the execution of such agreements between the NRC and the licensees, the liability-limitation provisions of the Act, to which appellees object, would simply not come into play. This fact, coupled with the District Court's finding that "but for" the liability-limitation provisions there is a substantial likelihood that the contemplated plants would not be built or operated, is sufficient to establish the justiciability of appellees' claim against the Commission. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S., at 44–46.

subject, it would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution. However, delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees—relief that would be forthcoming if they were to prevail in their various challenges to the Act. Similarly, delayed resolution would frustrate one of the key purposes of the Price-Anderson Act—the elimination of doubts concerning the scope of private liability in the event of major nuclear accident. In short, all parties would be adversely affected by a decision to defer definitive resolution of the constitutional validity *vel non* of the Price-Anderson Act. Since we are persuaded that "we will be in no better position later than we are now" to decide this question, *Id.*, at 143–145, we hold that it is presently ripe for adjudication.

IV

The District Court held that the Price-Anderson Act contravened the Due Process Clause because "[t]he amount of recovery is not rationally related to the potential losses"; because "[t]he Act tends to encourage irresponsibility in matters of safety and environmental protection . . ."; and finally because "[t]here is no *quid pro quo*" for the liability limitations. 431 F. Supp., at 222–223. An equal protection violation was also found because the Act "places the cost of [nuclear power] on an arbitrarily chosen segment of society, those injured by nuclear catastrophe." *Id.*, at 225. Application of the relevant constitutional principles forces the conclusion that these holdings of the District Court cannot be sustained.

A

Our due process analysis properly begins with a discussion of the appropriate standard of review. Appellants, portraying the liability-limitation provision as a legislative balancing of economic interests, urge that the Price-Anderson Act be

accorded the traditional presumption of constitutionality generally accorded economic regulations and that it be upheld absent proof of arbitrariness or irrationality on the part of Congress. See *Ferguson* v. *Skrupa*, 372 U. S. 726, 731–732 (1963); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15 (1976). Appellees, however, urge a more elevated standard of review on the ground that the interests jeopardized by the Price-Anderson Act "are far more important than those in the economic due process and business-oriented cases" where the traditional rationality standard has been invoked. Brief for Appellees 36. An intermediate standard like that applied in cases such as *Craig* v. *Boren*, 429 U. S. 190 (1976) (equal protection challenge to statute requiring that males be older than females in order to purchase beer) or *United States Trust Co. of New York* v. *New Jersey*, 431 U. S. 1 (1977) (Contract Clause challenge to repeal of statutory covenant providing security for bondholders) is thus recommended for our use here.

As we read the Act and its legislative history, it is clear that Congress' purpose was to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear incident. See, *e. g.*, S. Rep. No. 296, 85th Cong., 1st Sess., 15 (1957). The liability-limitation provision thus emerges as a classic example of an economic regulation—a legislative effort to structure and accommodate "the burdens and benefits of economic life." *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, at 15. "It is by now well established that [such] legislative Acts . . . come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Ibid.* That the accommodation struck may have profound and far-reaching consequences, contrary to appellees' suggestion, provides all the

more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.[27]

B

When examined in light of this standard of review, the Price-Anderson Act, in our view, passes constitutional muster. The record before us fully supports the need for the imposition of a statutory limit on liability to encourage private industry participation and hence bears a rational relationship to Congress' concern for stimulating the involvement of private enterprise in the production of electric energy through the use of atomic power; nor do we understand appellees or the District Court to be of a different view. Rather their challenge is to the alleged arbitrariness of the *particular figure* of $560 million, which is the statutory ceiling on liability. The District Court aptly summarized its position:

> "The amount of recovery is not rationally related to the potential losses. Abundant evidence in the record shows that although major catastrophe in any particular place is not certain and may not be extremely likely, nevertheless, in the territory where these plants are located, damage to life and property for this and future generations could well be many, many times the limit which the law places on liability." 431 F. Supp., at 222.

Assuming, *arguendo*, that the $560 million fund would not insure full recovery in all conceivable circumstances[28]—and

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[27] Appellees, in apparent reliance on our recent decision in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), argue that because the Price-Anderson Act encroaches on substantial state government interests, an augmented standard of review under the Due Process Clause is warranted. Nothing in *National League of Cities* or in our prior due process cases provides any support for this claim.

[28] As the various studies considered by the District Court indicate, there is considerable uncertainty as to the amount of damages which would result from a catastrophic nuclear accident. See 431 F. Supp., at

the hard truth is that no one can ever know—it does not by any means follow that the liability limitation is therefore irrational and violative of due process. The legislative history clearly indicates that the $560 million figure was not arrived at on the supposition that it alone would necessarily be sufficient to guarantee full compensation in the event of a nuclear incident. Instead, it was conceived of as a "starting point" or a working hypothesis.[29] The reasonableness of the statute's assumed ceiling on liability was predicated on two corollary considerations—expert appraisals of the exceedingly small risk of a nuclear incident involving claims in excess of $560 million, and the recognition that in the event of such an incident, Congress would likely enact extraordinary relief provisions to provide additional relief, in accord with prior practice.

> "[T]his limitation does not, as a practical matter, detract from the public protection afforded by this legislation. In the first place, the likelihood of an accident occurring

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210–214. The Reactor Safety Study published by the NRC in 1975 suggested that there was a 1 in 20,000 chance (per reactor year) of an accident causing property damage approaching $100 million and having only minor health effects. By contrast, when the odds were reduced to the range of 1 in 1 billion (per reactor year), the level of damages approached $14 billion; and 3,300 early fatalities and 45,000 early illnesses were predicted. NRC, Reactor Safety Study, An Assessment of Accident Risks in U. S. Commercial Nuclear Power Plants 83–85 (Wash-1400, Oct. 1975). For a thorough criticism of the Reactor Safety Study, see EPA, Reactor Safety Study (Wash-1400): A Review of the Final Report (June 1976).

[29] "What we were thinking about was the magnitude of protection and we set an arbitrary figure because it seemed to be practical at that time and because we didn't think an accident would happen . . . but yet we recognize that it could happen. *We wanted to have a base to work from.*" Hearings before the Joint Committee on Atomic Energy on Possible Modification or Extension of the Price-Anderson Insurance And Indemnity Act of 1957 In Order for Proper Planning of Nuclear Power Plants to Continue Without Delay, 93d Cong., 2d Sess., 68 (1974) (remarks of Rep. Holifield) (emphasis added).

> which would result in claims exceeding the sum of the financial protection required and the governmental indemnity is exceedingly remote, albeit theoretically possible. Perhaps more important, in the event of a national disaster of this magnitude, it is obvious that Congress would have to review the problem and take appropriate action. The history of other natural or man-made disasters, such as the Texas City incident, bears this out. The limitation of liability serves primarily as a device for facilitating further congressional review of such a situation, rather than as an ultimate bar to further relief of the public." H. R. Rep. No. 883, 89th Cong., 1st Sess., 6–7 (1965).

See also S. Rep. No. 296, *supra*, at 21; H. R. Rep. No. 94–648, pp. 12, 15 (1975).

Given our conclusion that, in general, limiting liability is an acceptable method for Congress to utilize in encouraging the private development of electric energy by atomic power, candor requires acknowledgment that whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that any choice of a figure based on imponderables like those at issue here can always be so characterized. This is not, however, the kind of arbitrariness which flaws otherwise constitutional action. When appraised in terms of both the extremely remote possibility of an accident where liability would exceed the limitation [30] and Congress' now statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" any such disaster, 42 U. S. C. § 2210 (e) (1970 ed., Supp. V),[31] we hold the

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[30] Congress' conclusion that "the probabilities of a nuclear incident are much lower and the likely consequences much less severe than has been thought previously," was a key factor in the decision not to increase the $560 million liability ceiling in 1975. S. Rep. No. 94–454, p. 12 (1975).

[31] In the past Congress has provided emergency assistance for victims of catastrophic accidents even in the absence of a prior statutory commitment to do so. For example, in 1955, Congress passed the Texas City

congressional decision to fix a $560 million ceiling, at this stage in the private development and production of electric energy by nuclear power, to be within permissible limits and not violative of due process.

This District Court's further conclusion that the Price-Anderson Act "tends to encourage irresponsibility . . . on the part of builders and owners" of the nuclear power plants, 431 F. Supp., at 222, simply cannot withstand careful scrutiny. We recently outlined the multitude of detailed steps involved in the review of any application for a license to construct or to operate a nuclear power plant, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519, 526–527, and n. 5 (1978); nothing in the liability-limitation provision undermines or alters in any respect the rigor and integrity of that process. Moreover, in the event of a nuclear accident the utility itself would suffer perhaps the largest damages. While obviously not to be compared with the loss of human life and injury to health, the risk of financial loss and possible bankruptcy to the utility is in itself no small incentive to avoid the kind of irresponsible and cavalier conduct implicitly attributed to licensees by the District Court.

The remaining due process objection to the liability-limitation provision is that it fails to provide those injured by a

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Explosion Relief Act, 69 Stat. 707, to provide relief for victims of the explosion of ammonium nitrate fertilizer in 1947. Congress took this action despite the decision in *Dalehite* v. *United States*, 346 U. S. 15 (1953), holding the United States free from any liability under the Federal Tort Claims Act for the damages incurred and injuries suffered. More recently Congress enacted legislation to provide relief for victims of the flood resulting from the collapse of the Teton Dam in Idaho. Pub. L. 94–400, 90 Stat. 1211. Under the Act, the Secretary of the Interior was authorized to provide full compensation for any deaths, personal injuries, or property damage caused by the failure of the dam. *Ibid.*

The Price-Anderson Act is, of course, a significant improvement on these prior relief efforts because it provides an advance guarantee of recovery up to $560 million plus an express commitment by Congress to take whatever further steps are necessary to aid the victims of a nuclear incident.

nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery which the Act abrogates. Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.[32] However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces. Cf. *New York Central R. Co.* v. *White*, 243 U. S. 188 (1917); *Crowell* v. *Benson*, 285 U. S. 22 (1932).[33]

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[32] Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases*, 223 U. S. 1, 50 (1912), quoting *Munn* v. *Illinois*, 94 U. S. 113, 134 (1877). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver* v. *Silver*, 280 U. S. 117, 122 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16 (1976). See also *Arizona Employers' Liability Cases*, 250 U. S. 400, 419–422 (1919). Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. See, *e. g.*, *Silver* v. *Silver*, *supra* (automobile guest statute); *Providence & New York S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578 (1883) (limitation of vessel owner's liability); *Indemnity Ins. Co. of North America* v. *Pan American Airways*, 58 F. Supp. 338 (SDNY 1944) (Warsaw Convention limitation on recovery for injuries suffered during international air travel). Cf. *Thomason* v. *Sanchez*, 539 F. 2d 955 (CA3 1976) (Federal Driver's Act).

[33] We reject at the outset appellees' contention that the Price-Anderson Act differs from other statutes limiting liability because the Act itself is the "but for" cause of the tort for which liability is limited. Put otherwise, the argument is that no *quid pro quo* can be provided by the Act since without it there would be no nuclear power plants and no possibility of accidents or injuries. As we understand the argument, it proceeds from the premise that prior to the enactment of the Price-Anderson Act, appellees had some right, cognizable under the Due Process Clause, to be free of nuclear power or to take advantage of the state of uncertainty which inhibited the private development of nuclear power. This premise we cannot accept. Appellees' only relevant right prior to the enactment

The legislative history of the liability-limitation provisions and the accompanying compensation mechanism reflects Congress' determination that reliance on state tort law remedies and state-court procedures was an unsatisfactory approach to assuring public compensation for nuclear accidents, while at the same time providing the necessary incentives for private development of nuclear-produced energy. The remarks of Chairman Anders of the NRC before the Joint Committee on Atomic Energy during the 1975 hearings on the need for renewal of the Price-Anderson Act are illustrative of this concern and of the expectation that the Act would provide a more efficient and certain vehicle for assuring compensation in the unlikely event of a nuclear incident:

> "The primary defect of this alternative [nonrenewal of the Act], however, is its failure to afford the public either a secure source of funds or a firm basis for legal liability with respect to new plants. While in theory no legal limit would be placed on liability, as a practical matter the public would be less assured of obtaining compensation than under Price-Anderson. Establishing liability would depend in each case on state tort law and procedures, and these might or might not provide for no-fault liability, let alone the multiple other protections now embodied in Price-Anderson. The present assurance of prompt and equitable compensation under a pre-structured and nationally applicable protective system would give way to uncertainties, variations and potentially lengthy delays in recovery. It should be emphasized, moreover, that it is collecting a judgment, not filing a

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of the Price-Anderson Act was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources. After the Act was passed, that right at least with regard to nuclear accidents was replaced by the compensation mechanism of the statute, and it is only the terms of that substitution which are pertinent to the *quid pro quo* inquiry which appellees insist the Due Process Clause requires.

lawsuit, that counts. Even if defenses are waived under state law, a defendant with theoretically "unlimited" liability may be unable to pay a judgment once obtained. When the defendant's assets are exhausted by earlier judgments, subsequent claimants would be left with uncollectable awards. The prospect of inequitable distribution would produce a race to the courthouse door in contrast to the present system of assured orderly and equitable compensation." Hearings on H. R. 8631 before Joint Committee on Atomic Energy, 94th Cong., 1st Sess., 69 (1975).

Appellees, like the District Court, differ with this appraisal on several grounds. They argue, *inter alia*, that recovery under the Act would not be greater than without it, that the waiver of defenses required by the Act, 42 U. S. C. § 2210 (n) (1970 ed., Supp. V), is an idle gesture since those involved in the development of nuclear energy would likely be held strictly liable under common-law principles; [34] that the claim-administration procedure under the Act delays rather than expedites individual recovery; and finally that recovery of even limited compensation is uncertain since the liability ceiling does not vary with the number of persons injured or amount of property damaged. The extension of short state statutes of limitations and the provision of omnibus [35] coverage do not save the Act, in their view, since such provisions could equally well be included in a fairer plan which would assure greater compensation.

We disagree. We view the congressional *assurance* of a $560 million fund for recovery, accompanied by an express statutory commitment, to "take whatever action is deemed necessary

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[34] See *Rylands* v. *Fletcher*, L. R. 3 E. & I. App. 330 (H. L. 1868). See generally W. Prosser, Law of Torts § 79, p. 516 (4th ed. 1971); Cavers, Improving Financial Protection of the Public Against the Hazards of Nuclear Power, 77 Harv. L. Rev. 644, 649 (1964).

[35] See n. 3, *supra*.

and appropriate to protect the public from the consequences of" a nuclear accident, 42 U. S. C. § 2210 (e) (1970 ed., Supp. V), to be a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer, whose resources might well be exhausted at an early stage. The record in this case raises serious questions about the ability of a utility or component manufacturer to satisfy a judgment approaching $560 million—the amount guaranteed under the Price-Anderson Act.[36] Nor are we persuaded that the mandatory waiver of defenses required by the Act is of no benefit to potential claimants. Since there has never been, to our knowledge, a case arising out of a nuclear incident like those covered by the Price-Anderson Act, any discussion of the standard of liability that state courts will apply is necessarily speculative. At the minimum, the statutorily mandated waiver of defenses establishes at the threshold the right of injured parties to compensation without proof of fault and eliminates the burden of delay and uncertainty which would follow from the need to litigate the question of liability after an accident. Further, even if strict liability were routinely applied, the common-law doctrine is subject to exceptions for acts of God or of third parties[37]—two of the very factors which appellees emphasized in the District Court in

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[36] The expert testimony before the District Court indicated that Duke Power, one of the largest utilities in the country, could not be expected to accumulate more than $200 million for damages claims without reaching the point of insolvency. App. 393–397. This amount, even when coupled with the amount of available private insurance, would be less than the $560 million provided by the Act. Moreover, if the liability were of sufficient magnitude to force the utility or component manufacturer into bankruptcy or reorganization, recovery would likely be further reduced and delayed. See Joint Committee on Atomic Energy, Issues of Financial Protection in Nuclear Activities in Selected Materials on Atomic Energy Indemnity and Insurance Legislation, 93d Cong., 2d Sess., 110 (Comm. Print 1974).

[37] See Prosser, *supra*, n. 34, at 520–521.

the course of arguing that the risks of a nuclear accident are greater than generally admitted. All of these considerations belie the suggestion that the Act leaves the potential victims of a nuclear disaster in a more disadvantageous position than they would be in if left to their common-law remedies—not known in modern times for either their speed or economy.

Appellees' remaining objections can be briefly treated. The claim-administration procedures under the Act provide that in the event of an accident with potential liability exceeding the $560 million ceiling, no more than 15% of the limit can be distributed pending court approval of a plan of distribution taking into account the need to assure compensation for "possible latent injury claims which may not be discovered until a later time." 42 U. S. C. § 2210 (*o*)(3) (1970 ed., Supp. V). Although some delay might follow from compliance with this statutory procedure, we doubt that it would approach that resulting from routine litigation of the large number of claims caused by a catastrophic accident.[38] Moreover, the statutory scheme insures the equitable distribution of benefits to all who suffer injury—both immediate and latent; under the common-law route, the proverbial race to the courthouse would instead determine who had "first crack" at the diminishing resources of the tortfeasor, and fairness could well be sacrificed in the process. The remaining contention that recovery is uncertain because of the aggregate rather than individualized nature of the liability ceiling is but a thinly disguised version of the contention that the $560 million figure is inadequate, which we have already rejected.

In the course of adjudicating a similar challenge to the

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[38] The Act explicitly provides for "payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident." 42 U. S. C. § 2210 (m). Unlike the normal tort recovery situation, these emergency payments are made prior to the determination of injury and the setting of damages, and are not conditioned on the execution of any release by the victim. *Ibid.*

Workmen's Compensation Act in *New York Central R. Co.* v. *White,* 243 U. S., at 201, the Court observed that the Due Process Clause of the Fourteenth Amendment was not violated simply because an injured party would not be able to recover as much under the Act as before its enactment. "[H]e is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages." The logic of *New York Central* would seem to apply with renewed force in the context of this challenge to the Price-Anderson Act. The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the $560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.

Although the District Court also found the Price-Anderson Act to contravene the "equal protection provision that is included within the Due Process Clause of the Fifth Amendment," 431 F. Supp., at 224–225, appellees have not relied on this ground since the equal protection arguments largely track and duplicate those made in support of the due process claim. In any event, we conclude that there is no equal protection violation. The general rationality of the Price-Anderson Act liability limitations—particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy—is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other

causes. Speculation regarding other arrangements that might be used to spread the risk of liability in ways different from the Price-Anderson Act is, of course, not pertinent to the equal protection analysis. See *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 378 (1973).[39]

Accordingly, the decision of the District Court is reversed, and the cases are remanded for proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, concurring in the result.

With some difficulty I can accept the proposition that federal subject-matter jurisdiction under 28 U. S. C. § 1331 (1976 ed.) exists here, at least with respect to the suit against the Nuclear Regulatory Commission, the agency responsible for the administration of the Price-Anderson Act. The claim under federal law is to be found in the allegation that the Act, if enforced, will deprive the appellees of certain property rights, in violation of the Due Process Clause of the Fifth Amendment. One of those property rights, and perhaps the sole cognizable one, is a state-created right to recover full compensation for tort injuries. The Act impinges on that right by limiting recovery in major accidents.

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[39] Appellees also contend that the Price-Anderson Act effects an unconstitutional "taking" because in the event of a catastrophic nuclear accident their property would be destroyed without any assurance of just compensation. We find it unnecessary to resolve the claim that such an accident would constitute a "taking" as that term has been construed in our precedents since on our reading the Price-Anderson Act does not withdraw the existing Tucker Act remedy, 28 U. S. C. § 1491 (1976 ed.). See *Regional Rail Reorganization Act Cases*, 419 U. S., at 125–136. Appellees concede that if the Tucker Act remedy would be available in the event of a nuclear disaster, then their constitutional challenge to the Price-Anderson Act under the Just Compensation Clause must fail. Brief for Appellees 71 n. 56. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day.

But there never has been such an accident, and it is sheer speculation that one will ever occur. For this reason I think there is no present justiciable controversy, and that the appellees were without standing to initiate this litigation.

On the issue of standing, the Court relies on the "present" injuries of increased water temperatures and low-level radiation emissions. Even assuming that but for the Act the plant would not exist and therefore neither would its effects on the environment, I cannot believe that it follows that the appellees have standing to attack the constitutionality of the Act. Apart from a "but for" connection in the loosest sense of that concept, there is no relationship at all between the injury alleged for standing purposes and the injury alleged for federal subject-matter jurisdiction.

Surely a plaintiff does not have standing simply because his challenge, if successful, will remove the injury relied on for standing purposes *only* because it will put the defendant out of existence. Surely there must be *some* direct relationship between the plaintiff's federal claim and the injury relied on for standing. Cf. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261; *United States* v. *SCRAP*, 412 U. S. 669, 687–690; *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617–618. An interest in the local water temperature does not, in short, give these appellees standing to bring a suit under 28 U. S. C. § 1331 (1976 ed.) to challenge the constitutionality of a law limiting liability in an unrelated and as-yet-to-occur major nuclear accident.

For these reasons, I would remand these cases to the District Court with instructions to dismiss the complaint.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEVENS joins, concurring in the judgment.

I can understand the Court's willingness to reach the merits of this case and thereby remove the doubt which has been cast over this important federal statute. In so doing, however, it ignores established limitations on district court jurisdiction

as carefully defined in our statutes and cases. Because I believe the preservation of these limitations is in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important, I too would reverse the judgment of the District Court, but would do so with instructions to dismiss the complaint for want of jurisdiction. Cf. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 249–250 (1951).

Giving the conclusory allegations of appellees' complaint the most liberal possible reading, they purport to establish only two grounds for the declaratory relief requested. First, they contend that the Price-Anderson Act deprives them of their property without due process of law in that it irrationally limits the tort recovery otherwise available in the North Carolina courts.[1] Second, they contend that the Act works an unconstitutional taking of their property for public use without just compensation. They purport to base District Court jurisdiction upon 28 U. S. C. § 1337 (1976 ed.) which covers "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

I

It is apparent that appellees' first asserted basis for relief does not state a claim "arising under" the Price-Anderson Act. Their complaint alleges that the operation of the two power plants will cause immediate injury to property within their vicinity. App. 32, ¶ 21. The District Court explicitly found that these injuries "give rise to an immediate right of action for redress. Under the law of North Carolina a right of action arises as soon as a wrongful act has created 'any injury, how-

[1] Appellees have explicitly abandoned their claim based upon the so-called equal protection component of the Fifth Amendment "since in this case any equal protection arguments would be largely duplicative of appellees' due process arguments." Brief for Appellees 21 n. 26.

ever slight,' to the plaintiff." 431 F. Supp. 203, 221 (WDNC 1977) (citations omitted). This right of action provided by state, not federal, law is the property of which the appellees contend the Act deprives them without due process. Thus, the constitutionality of the Act becomes relevant only if the appellant Duke Power Co. were to invoke the Act as a defense to appellees' suit for recovery under their North Carolina right of action.

It has long been established that the mere anticipation of a possible federal defense to a state cause of action is not sufficient to invoke the federal-question jurisdiction of the district courts. In *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908), the plaintiffs sought to compel the specific performance of a contract by which the railroad had granted them free passes for life. Although their contract was not predicated upon federal law, the plaintiffs contended that federal-question jurisdiction was established by the presence of an Act of Congress forbidding railroads to issue free passes. This Court held that the District Court did not have jurisdiction to consider whether the Act was inapplicable or unconstitutional:

> "It is the settled interpretation of these words ['arising under'], as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." *Id.*, at 152.

Just as the underlying claim in *Mottley* arose under Kentucky contract law, the underlying claim in this case arises under North Carolina tort law. This Court has construed the "arising under" language of 28 U. S. C. § 1337 (1976 ed.) just as it has the similar language of 28 U. S. C. § 1331 (1976 ed.). *Peyton* v. *Railway Express Agency, Inc.*, 316 U. S. 350, 353 (1942).

Nor does the fact that appellees seek only declaratory relief under the Declaratory Judgment Act, 28 U. S. C. § 2201 (1976 ed.), support a different result. This Court has held that the well-pleaded complaint rule applied in *Mottley* is fully applicable in cases seeking only declaratory relief, because the Declaratory Judgment Act merely expands the remedies available in the district courts without expanding their jurisdiction. "It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 673 (1950). See also *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U. S. 125 (1974); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3566, pp. 437–438 (1975).[2]

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[2] The Court asserts that its decision today does not undermine the well-pleaded complaint doctrine because of its conclusion "that the complaint is more fairly read as stating a claim against the NRC directly under the Due Process Clause of the Fifth Amendment." *Ante*, at 69 n. 13. The supposed claim against the Commission arises only under federal law, since the complaint does not allege and the District Court did not find that North Carolina law would provide any remedy against it as a joint tortfeasor. On the Court's theory of the case, then, it need not decide whether jurisdiction could be obtained over Duke Power under § 1331. *Ante*, at 72 n. 16. That is a particularly felicitous conclusion from the Court's point of view, since the complaint does not allege that each member of the plaintiff class has a claim in excess of $10,000 against Duke Power,

Appellees do not contend that the Price-Anderson Act itself grants to them personal rights which may be vindicated in a federal proceeding. Since the only property rights they assert arise under North Carolina law, the District Court had no jurisdiction to consider whether the setting up of an Act of Congress as a defense against those rights would deny them due process of law under the Fifth Amendment.

Indeed, the Court does not even contend that there is an independent statutory source of jurisdiction over Duke. *Ante,* at 72 n. 16. It suggests instead that the complaint states a claim against the Nuclear Regulatory Commission, not as a joint tortfeasor under North Carolina law, but as the administrator of an unconstitutional federal statute. The Court's theory is that the complaint alleges the existence of an implied right of action under the Fifth Amendment to obtain relief against arbitrary federal statutes. It can hardly be said that this theory of the case emerges with crystal clarity from either the complaint or the brief of the appellees.

More importantly, there is no allegation in this complaint that the Nuclear Regulatory Commission has taken or will take any unconstitutional action at all. The complaint alleges only that the Commission granted construction permits to

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which is a prerequisite to jurisdiction under § 1331. *Zahn* v. *International Paper Co.,* 414 U. S. 291 (1973).

Despite the Court's assurances, it is conceivable that the practical effect of today's decision could be an erosion of the well-pleaded complaint doctrine. Had the plaintiffs in *Mottley* joined as defendants a federal agency having as ephemeral a relation to the statute challenged there as does the Commission to the statute involved here, the District Court, according to today's decision, would have had jurisdiction to consider the constitutionality of the statute, even though its judgment would not have been binding against the Louisville & Nashville Railroad. Innumerable federal statutes and regulations affect the daily decisions of private parties, who would undoubtedly appreciate the sort of advisory opinion rendered today on the validity of those provisions. This Court should not encourage the hope that such opinions may be obtained by suing an appropriate federal agency under a claim which verges on the frivolous.

Duke, and that it will enter into an agreement "to indemnify Duke for any nuclear incident exceeding the amount of $125,000,000 subject to a maximum liability of $560,000,000." App. 31, ¶ 13. Neither of these actions is alleged to be unconstitutional. The gist of the complaint is the asserted unconstitutionality of 42 U. S. C. § 2210 (e) (1970 ed., Supp. V), which limits Duke's liability. But this limitation of liability is separate and apart from the indemnity agreement which the Commission is authorized to execute under 42 U. S. C. § 2210 (d) (1970 ed., Supp. V). The Commission has nothing whatever to do with the administration of the limitation of liability; whatever administration of that statute there is to be is left in the hands of the District Court. 42 U. S. C. § 2210 (*o*) (1970 ed. and Supp. V). The District Court, of course, is not a party to this suit.[3]

It simply cannot be said that these allegations make out an actual controversy against the Commission. While the Commission may be quite interested in the constitutionality of the statute, that is hardly sufficient to establish a justiciable controversy. *Muskrat* v. *United States,* 219 U. S. 346, 361–362 (1911). While appellees may have been damaged by Duke's decision to construct these plants, there is no "challenged action of the defendant" Commission to which their damage "fairly can be traced." *Simon* v. *Eastern Ky. Wel-*

[3] Appellees' challenge to the construction permits was rejected in *Carolina Environmental Study Group* v. *United States,* 166 U. S. App. D. C. 416, 510 F. 2d 796 (1975). It is true, as the Court remarks, *ante,* at 81 n. 26, that "absent the execution of such [indemnity] agreements between the NRC and the licensees, the liability-limitation provisions of the Act, to which appellees object, would simply not come into play." That logical connection, however, does not amount to an allegation that the Commission's execution of an indemnity agreement is itself unconstitutional. The only federal action challenged by this complaint is a hypothetical district court's hypothetical invocation of the statute in the event of a hypothetical nuclear accident. In that entire string of hypothetical events, no action of the Commission is alleged to be unconstitutional.

fare Rights Org., 426 U. S. 26, 41 (1976). If Duke decided to proceed with construction despite a declaration of the statute's unconstitutionality, there would be nothing that the Commission could do to aid appellees. Where the prospect of effective relief against a defendant depends on the actions of a third party, no justiciable controversy exists against that defendant. *Warth* v. *Seldin*, 422 U. S. 490, 505 (1975). In short, appellees' only conceivable controversy is with Duke, over whom the District Court had no jurisdiction.

II

As appellees themselves describe the second aspect of their complaint, "the central issue is whether in the circumstances of this case, the complete destruction of appellees' property by a nuclear accident, occurring at one of Duke's plants, would be a 'taking' by the United States, as that term is defined in the Fifth Amendment." Brief for Appellees 62. This statement makes clear that appellees' claim arises not under the Price-Anderson Act but under the Fifth Amendment itself. Jurisdiction under § 1337 extends only to actions vindicating rights created by an Act of Congress. Compare *Switchmen* v. *National Mediation Board*, 320 U. S. 297, 300 (1943), with *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 337 (1943). Since it cannot be maintained that the Price-Anderson Act *created* appellees' asserted right to be free from takings for public use without just compensation, it follows that District Court jurisdiction may not be predicated upon § 1337.

The District Court does have jurisdiction to consider claims of taking under the Tucker Act, 28 U. S. C. § 1346 (a)(2) (1976 ed.), where the amount in controversy does not exceed $10,000.[4] "But the Act has long been construed as authoriz-

[4] The Court concludes, *ante*, at 71 n. 15, although appellees do not so contend, that their taking claim is cognizable under 28 U. S. C. § 1331 (a) (1976 ed.), which grants jurisdiction to the district courts where the suit

ing only actions for money judgments and not suits for equitable relief against the United States." *Richardson* v. *Morris*, 409 U. S. 464, 465 (1973). It is incontrovertibly established that neither the Court of Claims nor the district courts have jurisdiction under the Tucker Act to issue the sort of declaratory relief granted here. Compare *ibid.*, with *United States* v. *King*, 395 U. S. 1 (1969). Thus, the record does not establish any jurisdictional basis upon which the District Court could grant declaratory relief on appellees' taking claim.

There being no basis for District Court jurisdiction over either of appellees' claims, its judgment should be reversed and the cause remanded with instructions to dismiss the complaint for want of jurisdiction.

MR. JUSTICE STEVENS, concurring in the judgment.

The string of contingencies that supposedly holds this litigation together is too delicate for me. We are told that but for the Price-Anderson Act there would be no financing of nuclear power plants, no development of those plants by private parties, and hence no present injury to persons such as appellees; we are then asked to remedy an alleged due process viola-

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"arises under the Constitution." The Court cites only the *Regional Rail Reorganization Act Cases*, 419 U. S. 102 (1974), in support of its conclusion that this claim may be maintained under § 1331. It is, of course, well established that "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Lavine*, 415 U. S. 528, 535 n. 5 (1974). In the *Regional Rail Reorganization Act Cases* this Court's opinion did not even cite the statutory basis for jurisdiction, much less consider its validity. To conclude that § 1331 embraces a "taking" claim makes the Tucker Act largely superfluous, cf. *United States* v. *Testan*, 424 U. S. 392, 404 (1976), and will permit the district courts to consider claims of over $10,000 which previously could only be litigated in the Court of Claims. *Richardson* v. *Morris*, 409 U. S. 464 (1973). Such a significant expansion of the jurisdiction of the district courts should not be accomplished without the benefit of arguments and briefing.

tion that may possibly occur at some uncertain time in the future, and may possibly injure the appellees in a way that has no significant connection with any present injury. It is remarkable that such a series of speculations is considered sufficient either to make this litigation ripe for decision or to establish appellees' standing;* it is even more remarkable that this occurs in a case in which, as MR. JUSTICE REHNQUIST demonstrates, there is no federal jurisdiction in the first place.

The Court's opinion will serve the national interest in removing doubts concerning the constitutionality of the Price-Anderson Act. I cannot, therefore, criticize the statesmanship of the Court's decision to provide the country with an advisory opinion on an important subject. Nevertheless, my view of the proper function of this Court, or of any other federal court, in the structure of our Government is more limited. We are not statesmen; we are judges. When it is necessary to resolve a constitutional issue in the adjudication of an actual case or controversy, it is our duty to do so. But whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength.

I join MR. JUSTICE REHNQUIST'S opinion concurring in the judgment.

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*With respect to whether appellees' claim of present injury is sufficient to establish standing, it should be noted that some sort of financing is essential to almost all projects, public or private. Statutes that facilitate and may be essential to the financing abound—from tax statutes to statutes prohibiting fraudulent securities transactions. One would not assume, however, that mere neighbors have standing to litigate the legality of a utility's financing. Cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723.

PENN CENTRAL TRANSPORTATION CO. ET AL. *v.* NEW YORK CITY ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 77–444. Argued April 17, 1978—Decided June 26, 1978

Under New York City's Landmarks Preservation Law (Landmarks Law), which was enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character, the Landmarks Preservation Commission (Commission) may designate a building to be a "landmark" on a particular "landmark site" or may designate an area to be a "historic district." The Board of Estimate may thereafter modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. The owner of the designated landmark must keep the building's exterior "in good repair" and before exterior alterations are made must secure Commission approval. Under two ordinances owners of landmark sites may transfer development rights from a landmark parcel to proximate lots. Under the Landmarks Law, the Grand Central Terminal (Terminal), which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central) was designated a "landmark" and the block it occupies a "landmark site." Appellant Penn Central, though opposing the designation before the Commission, did not seek judicial review of the final designation decision. Thereafter appellant Penn Central entered into a lease with appellant UGP Properties, whereby UGP was to construct a multistory office building over the Terminal. After the Commission had rejected appellants' plans for the building as destructive of the Terminal's historic and aesthetic features, with no judicial review thereafter being sought, appellants brought suit in state court claiming that the application of the Landmarks Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. The trial court's grant of relief was reversed on appeal, the New York Court of Appeals ultimately concluding that there was no "taking" since the Landmarks Law had not transferred control of the property to the city, but only restricted appellants' exploitation of it; and that there was no denial of due process because (1) the same use of the Terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their invest-

ment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area must realistically be imputed to the Terminal; and (4) the development rights above the Terminal, which were made transferable to numerous sites in the vicinity, provided significant compensation for loss of rights above the Terminal itself. *Held:* The application of the Landmarks Law to the Terminal property does not constitute a "taking" of appellants' property within the meaning of the Fifth Amendment as made applicable to the States by the Fourteenth Amendment. Pp. 123–138.

(a) In a wide variety of contexts the government may execute laws or programs that adversely affect recognized economic values without its action constituting a "taking," and in instances such as zoning laws where a state tribunal has reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected real property interests. In many instances use restrictions that served a substantial public purpose have been upheld against "taking" challenges, *e. g., Goldblatt* v. *Hempstead,* 369 U. S. 590; *Hadacheck* v. *Sebastian,* 239 U. S. 394, though a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to constitute a "taking," *e. g., Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, and government acquisitions of resources to permit uniquely public functions constitute "takings," *e. g., United States* v. *Causby,* 328 U. S. 256. Pp. 123–128.

(b) In deciding whether particular governmental action has effected a "taking," the character of the action and nature and extent of the interference with property rights (here the city tax block designated as the "landmark site") are focused upon, rather than discrete segments thereof. Consequently, appellants cannot establish a "taking" simply by showing that they have been denied the ability to exploit the superjacent airspace, irrespective of the remainder of appellants' parcel. Pp. 130–131.

(c) Though diminution in property value alone, as may result from a zoning law, cannot establish a "taking," as appellants concede, they urge that the regulation of individual landmarks is different because it applies only to selected properties. But it does not follow that landmark laws, which embody a comprehensive plan to preserve structures of historic or aesthetic interest, are discriminatory, like "reverse spot" zoning. Nor can it be successfully contended that designation of a landmark involves only a matter of taste and therefore will inevitably

lead to arbitrary results, for judicial review is available and there is no reason to believe it will be less effective than would be so in the case of zoning or any other context. Pp. 131–133.

(d) That the Landmarks Law affects some landowners more severely than others does not itself result in "taking," for that is often the case with general welfare and zoning legislation. Nor, contrary to appellants' contention, are they solely burdened and unbenefited by the Landmarks Law, which has been extensively applied and was enacted on the basis of the legislative judgment that the preservation of landmarks benefits the citizenry both economically and by improving the overall quality of city life. Pp. 133–135.

(e) The Landmarks Law no more effects an appropriation of the airspace above the Terminal for governmental uses than would a zoning law appropriate property; it simply prohibits appellants or others from occupying certain features of that space while allowing appellants gainfully to use the remainder of the parcel. *United States* v. *Causby, supra,* distinguished. P. 135.

(f) The Landmarks Law, which does not interfere with the Terminal's present uses or prevent Penn Central from realizing a "reasonable return" on its investment, does not impose the drastic limitation on appellants' ability to use the air rights above the Terminal that appellants claim, for on this record there is no showing that a smaller, harmonizing structure would not be authorized. Moreover, the pre-existing air rights are made transferable to other parcels in the vicinity of the Terminal, thus mitigating whatever financial burdens appellants have incurred. Pp. 135–137.

42 N. Y. 2d 324, 366 N. E. 2d 1271, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEVENS, J., joined, *post,* p. 138.

Daniel M. Gribbon argued the cause for appellants. With him on the briefs were *John R. Bolton* and *Carl Helmetag, Jr.*

Leonard Koerner argued the cause for appellees. With him on the brief were *Allen G. Schwartz, L. Kevin Sheridan,* and *Dorothy Miner.*

Assistant Attorney General Wald argued the cause for the United States as *amicus curiae* urging affirmance. On the

brief were *Solicitor General McCree, Assistant Attorney General Moorman, Peter R. Steenland, Jr.,* and *Carl Strass.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a "taking" requiring the payment of "just compensation." Specifically, we must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has "taken" its owners' property in violation of the Fifth and Fourteenth Amendments.

I

A

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.[1] These nationwide legislative efforts have been

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*Briefs of *amici curiae* urging affirmance were filed by *David Bonderman* and *Frank B. Gilbert* for the National Trust for Historic Preservation et al.; by *Paul S. Byard, Ralph C. Menapace, Jr., Terence H. Benbow, William C. Chanler, Richard H. Pershan, Francis T. P. Plimpton, Whitney North Seymour,* and *Bethuel M. Webster* for the Committee to Save Grand Central Station et al.; and by *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Philip Weinberg,* Assistant Attorney General, for the State of New York.

Briefs of *amici curiae* were filed by *Evelle J. Younger,* Attorney General, *E. Clement Shute, Jr.,* and *Robert H. Connett,* Assistant Attorneys General, and *Richard C. Jacobs,* Deputy Attorney General, for the State of California; and by *Eugene J. Morris* for the Real Estate Board of New York, Inc.

[1] See National Trust for Historic Preservation, A Guide to State Historic Preservation Programs (1976); National Trust for Historic Preservation,

precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed [2] without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways.[3] The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. "[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people." [4]

New York City, responding to similar concerns and acting

Directory of Landmark and Historic District Commissions (1976). In addition to these state and municipal legislative efforts, Congress has determined that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people," National Historic Preservation Act of 1966, 80 Stat. 915, 16 U. S. C. § 470 (b) (1976 ed.), and has enacted a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance. See generally Gray, The Response of Federal Legislation to Historic Preservation, 36 Law & Contemp. Prob. 314 (1971).

[2] Over one-half of the buildings listed in the Historic American Buildings Survey, begun by the Federal Government in 1933, have been destroyed. See Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv. L. Rev. 574, 574 n. 1 (1972), citing Huxtable, Bank's Building Plan Sets Off Debate on "Progress," N. Y. Times, Jan. 17, 1971, section 8, p. 1, col. 2.

[3] See, *e. g.*, N. Y. C. Admin. Code § 205–1.0 (a) (1976).

[4] Gilbert, Introduction, Precedents for the Future, 36 Law & Contemp. Prob. 311, 312 (1971), quoting address by Robert Stipe, 1971 Conference on Preservation Law, Washington, D. C., May 1, 1971 (unpublished text, pp. 6–7).

pursuant to a New York State enabling Act,[5] adopted its Landmarks Preservation Law in 1965. See N. Y. C. Admin. Code, ch. 8–A, § 205–1.0 *et seq.* (1976). The city acted from the conviction that "the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government" would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character. § 205–1.0 (a). The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: *e. g.,* fostering "civic pride in the beauty and noble accomplishments of the past"; protecting and enhancing "the city's attractions to tourists and visitors"; "support[ing] and stimul[ating] business and industry"; "strengthen[ing] the economy of the city"; and promoting "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city." § 205–1.0 (b).

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties,[6] but rather by involving public entities in land-use decisions affecting these properties

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[5] See N. Y. Gen. Mun. Law § 96–a (McKinney 1977). It declares that it is the public policy of the State of New York to preserve structures and areas with special historical or aesthetic interest or value and authorizes local governments to impose reasonable restrictions to perpetuate such structures and areas.

[6] The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as museums and similar facilities, rather than as economically productive features of the urban scene. See Wilson & Winkler, The Response of State Legislation to Historic Preservation, 36 Law & Contemp. Prob. 329, 330–331, 339–340 (1971).

and providing services, standards, controls, and incentives that will encourage preservation by private owners and users.[7] While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a "reasonable return" on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

The operation of the law can be briefly summarized. The primary responsibility for administering the law is vested in the Landmarks Preservation Commission (Commission), a broad based, 11-member agency[8] assisted by a technical staff. The Commission first performs the function, critical to any landmark preservation effort, of identifying properties and areas that have "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." § 207–1.0 (n); see § 207–1.0 (h). If the Commission determines, after giving all interested parties an opportunity to be heard, that a building or area satisfies the ordinance's criteria, it will designate a building to be a "landmark," § 207–1.0 (n),[9] situ-

[7] See Costonis, *supra* n. 2, at 580–581; Wilson & Winkler, *supra* n. 6; Rankin, Operation and Interpretation of the New York City Landmark Preservation Law, 36 Law & Contemp. Prob. 366 (1971).

[8] The ordinance creating the Commission requires that it include at least three architects, one historian qualified in the field, one city planner or landscape architect, one realtor, and at least one resident of each of the city's five boroughs. N. Y. C. Charter § 534 (1976). In addition to the ordinance's requirements concerning the composition of the Commission, there is, according to a former chairman, a "prudent tradition" that the Commission include one or two lawyers, preferably with experience in municipal government, and several laymen with no specialized qualifications other than concern for the good of the city. Goldstone, Aesthetics in Historic Districts, 36 Law & Contemp. Prob. 379, 384–385 (1971).

[9] " 'Landmark.' Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural character-

ated on a particular "landmark site," § 207–1.0 (o),[10] or will designate an area to be a "historic district," § 207–1.0 (h).[11] After the Commission makes a designation, New York City's Board of Estimate, after considering the relationship of the designated property "to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved," § 207–2.0 (g)(1), may modify or disapprove the designation, and the owner may seek judicial review of the final designation decision. Thus far, 31 historic districts and over 400 individual landmarks have been finally designated,[12] and the process is a continuing one.

Final designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site. First, the law imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the law's objectives not be defeated by the landmark's

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istics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter." § 207–1.0 (n).

[10] " 'Landmark site.' An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter." § 207–1.0 (o).

[11] " 'Historic district.' Any area which: (1) contains improvements which: (a) have a special character or special historical or aesthetic interest or value; and (b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and (c) cause such area, by reason of such factors, to constitute a distinct section of the city; and (2) has been designated as a historic district pursuant to the provisions of this chapter." § 207–1.0 (h). The Act also provides for the designation of a "scenic landmark," see § 207–1.0 (w), and an "interior landmark." See § 207–1.0 (m).

[12] See Landmarks Preservation Commission of the City of New York, Landmarks and Historic Districts (1977). Although appellants are correct in noting that some of the designated landmarks are publicly owned, the vast majority are, like Grand Central Terminal, privately owned structures.

falling into a state of irremediable disrepair. See § 207–10.0 (a). Second, the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site, thus ensuring that decisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property. See §§ 207–4.0 to 207–9.0.

In the event an owner wishes to alter a landmark site, three separate procedures are available through which administrative approval may be obtained. First, the owner may apply to the Commission for a "certificate of no effect on protected architectural features": that is, for an order approving the improvement or alteration on the ground that it will not change or affect any architectural feature of the landmark and will be in harmony therewith. See § 207–5.0. Denial of the certificate is subject to judicial review.

Second, the owner may apply to the Commission for a certificate of "appropriateness." See § 207–6.0. Such certificates will be granted if the Commission concludes—focusing upon aesthetic, historical, and architectural values—that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Again, denial of the certificate is subject to judicial review. Moreover, the owner who is denied either a certificate of no exterior effect or a certificate of appropriateness may submit an alternative or modified plan for approval. The final procedure—seeking a certificate of appropriateness on the ground of "insufficient return," see § 207–8.0—provides special mechanisms, which vary depending on whether or not the landmark enjoys a tax exemption,[13] to ensure that designation does not cause economic hardship.

[13] If the owner of a non-tax-exempt parcel has been denied certificates of appropriateness for a proposed alteration and shows that he is not earning

Although the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect. Under New York City's zoning laws, owners of real property who have not developed their property

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a reasonable return on the property in its present state, the Commission and other city agencies must assume the burden of developing a plan that will enable the landmark owner to earn a reasonable return on the landmark site. The plan may include, but need not be limited to, partial or complete tax exemption, remission of taxes, and authorizations for alterations, construction, or reconstruction appropriate for and not inconsistent with the purposes of the law. § 207–8.0 (c). The owner is free to accept or reject a plan devised by the Commission and approved by the other city agencies. If he accepts the plan, he proceeds to operate the property pursuant to the plan. If he rejects the plan, the Commission may recommend that the city proceed by eminent domain to acquire a protective interest in the landmark, but if the city does not do so within a specified time period, the Commission must issue a notice allowing the property owner to proceed with the alteration or improvement as originally proposed in his application for a certificate of appropriateness.

Tax-exempt structures are treated somewhat differently. They become eligible for special treatment only if four preconditions are satisfied: (1) the owner previously entered into an agreement to sell the parcel that was contingent upon the issuance of a certificate of approval; (2) the property, as it exists at the time of the request, is not capable of earning a reasonable return; (3) the structure is no longer suitable to its past or present purposes; and (4) the prospective buyer intends to alter the landmark structure. In the event the owner demonstrates that the property in its present state is not earning a reasonable return, the Commission must either find another buyer for it or allow the sale and construction to proceed.

But this is not the only remedy available for owners of tax-exempt landmarks. As the case at bar illustrates, see *infra*, at 121, if an owner files suit and establishes that he is incapable of earning a "reasonable return" on the site in its present state, he can be afforded judicial relief. Similarly, where a landmark owner who enjoys a tax exemption has demonstrated that the landmark structure, as restricted, is totally inadequate for the owner's "legitimate needs," the law has been held invalid as applied to that parcel. See *Lutheran Church* v. *City of New York*, 35 N. Y. 2d 121, 316 N. E. 2d 305 (1974).

to the full extent permitted by the applicable zoning laws are allowed to transfer development rights to contiguous parcels on the same city block. See New York City, Zoning Resolution Art. I, ch. 2, § 12–10 (1978) (definition of "zoning lot"). A 1968 ordinance gave the owners of landmark sites additional opportunities to transfer development rights to other parcels. Subject to a restriction that the floor area of the transferee lot may not be increased by more than 20% above its authorized level, the ordinance permitted transfers from a landmark parcel to property across the street or across a street intersection. In 1969, the law governing the conditions under which transfers from landmark parcels could occur was liberalized, see New York City Zoning Resolutions 74–79 to 74–793, apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal. See Marcus, Air Rights Transfers in New York City, 36 Law & Contemp. Prob. 372, 375 (1971). The class of recipient lots was expanded to include lots "across a street and opposite to another lot or lots which except for the intervention of streets or street intersections f[or]m a series extending to the lot occupied by the landmark building[, provided that] all lots [are] in the same ownership." New York City Zoning Resolution 74–79 (emphasis deleted).[14] In addition, the 1969 amendment permits, in highly commer-

[14] To obtain approval for a proposed transfer, the landmark owner must follow the following procedure. First, he must obtain the permission of the Commission which will examine the plans for the development of the transferee lot to determine whether the planned construction would be compatible with the landmark. Second, he must obtain the approbation of New York City's Planning Commission which will focus on the effects of the transfer on occupants of the buildings in the vicinity of the transferee lot and whether the landmark owner will preserve the landmark. Finally, the matter goes to the Board of Estimate, which has final authority to grant or deny the application. See also Costonis, *supra* n. 2, at 585–586.

cialized areas like midtown Manhattan, the transfer of all unused development rights to a single parcel. *Ibid.*

B

This case involves the application of New York City's Landmarks Preservation Law to Grand Central Terminal (Terminal). The Terminal, which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central), is one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.

The Terminal is located in midtown Manhattan. Its south facade faces 42d Street and that street's intersection with Park Avenue. At street level, the Terminal is bounded on the west by Vanderbilt Avenue, on the east by the Commodore Hotel, and on the north by the Pan-American Building. Although a 20-story office tower, to have been located above the Terminal, was part of the original design, the planned tower was never constructed.[15] The Terminal itself is an eight-story structure which Penn Central uses as a railroad station and in which it rents space not needed for railroad purposes to a variety of commercial interests. The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan. The others include the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building and other office buildings along Park Avenue, and the Yale Club. At least eight of these are eligible to be recipients of development rights afforded the Terminal by virtue of landmark designation.

On August 2, 1967, following a public hearing, the Commission designated the Terminal a "landmark" and designated the

[15] The Terminal's present foundation includes columns, which were built into it for the express purpose of supporting the proposed 20-story tower.

"city tax block" it occupies a "landmark site." [16] The Board of Estimate confirmed this action on September 21, 1967. Although appellant Penn Central had opposed the designation before the Commission, it did not seek judicial review of the final designation decision.

On January 22, 1968, appellant Penn Central, to increase its income, entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter. The rentals would be offset in part by a loss of some $700,000 to $1 million in net rentals presently received from concessionaires displaced by the new building.

Appellants UGP and Penn Central then applied to the Commission for permission to construct an office building atop the Terminal. Two separate plans, both designed by architect Marcel Breuer and both apparently satisfying the terms of the applicable zoning ordinance, were submitted to the Commission for approval. The first, Breuer I, provided for the construction of a 55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal. The second, Breuer II Revised,[17] called for tearing

[16] The Commission's report stated:

"Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts." Record 2240.

[17] Appellants also submitted a plan, denominated Breuer II, to the Commission. However, because appellants learned that Breuer II would have violated existing easements, they substituted Breuer II Revised for Breuer II, and the Commission evaluated the appropriateness only of Breuer II Revised.

down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal's facade, and constructing a 53-story office building. The Commission denied a certificate of no exterior effect on September 20, 1968. Appellants then applied for a certificate of "appropriateness" as to both proposals. After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.

The Commission's reasons for rejecting certificates respecting Breuer II Revised are summarized in the following statement: "To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off." Record 2255. Breuer I, which would have preserved the existing vertical facades of the present structure, received more sympathetic consideration. The Commission first focused on the effect that the proposed tower would have on one desirable feature created by the present structure and its surroundings: the dramatic view of the Terminal from Park Avenue South. Although appellants had contended that the Pan-American Building had already destroyed the silhouette of the south facade and that one additional tower could do no further damage and might even provide a better background for the facade, the Commission disagreed, stating that it found the majestic approach from the south to be still unique in the city and that a 55-story tower atop the Terminal would be far more detrimental to its south facade than the Pan-American Building 375 feet away. Moreover, the Commission found that from closer vantage points the Pan-American Building and the other towers were largely cut off from view, which would not be the case of the mass on top of the Terminal planned under Breuer I. In conclusion, the Commission stated:

> "[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done . . . . But to balance a 55-story office tower above

a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

"Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it." *Id.*, at 2251.[18]

Appellants did not seek judicial review of the denial of either certificate. Because the Terminal site enjoyed a tax exemption,[19] remained suitable for its present and future uses, and was not the subject of a contract of sale, there were no further administrative remedies available to appellants as to the Breuer I and Breuer II Revised plans. See n. 13, *supra*. Further, appellants did not avail themselves of the opportunity to develop

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[18] In discussing Breuer I, the Commission also referred to a number of instances in which it had approved additions to landmarks: "The office and reception wing added to Gracie Mansion and the school and church house added to the 12th Street side of the First Presbyterian Church are examples that harmonize in scale, material and character with the structures they adjoin. The new Watch Tower Bible and Tract Society building on Brooklyn Heights, though completely modern in idiom, respects the qualities of its surroundings and will enhance the Brooklyn Heights Historic District, as Butterfield House enhances West 12th Street, and Breuer's own Whitney Museum its Madison Avenue locale." Record 2251.

[19] See N. Y. Real Prop. Tax Law § 489-aa *et seq.* (McKinney Supp. 1977).

and submit other plans for the Commission's consideration and approval. Instead, appellants filed suit in New York Supreme Court, Trial Term, claiming, *inter alia*, that the application of the Landmarks Preservation Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment. Appellants sought a declaratory judgment, injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site, and damages for the "temporary taking" that occurred between August 2, 1967, the designation date, and the date when the restrictions arising from the Landmarks Law would be lifted. The trial court granted the injunctive and declaratory relief, but severed the question of damages for a "temporary taking." [20]

Appellees appealed, and the New York Supreme Court, Appellate Division, reversed. 50 App. Div. 2d 265, 377 N. Y. S. 2d 20 (1975). The Appellate Division held that the restrictions on the development of the Terminal site were necessary to promote the legitimate public purpose of protecting landmarks and therefore that appellants could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property. The Appellate Division held that the evidence appellants

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[20] Although that court suggested that any regulation of private property to protect landmark values was unconstitutional if "just compensation" were not afforded, it also appeared to rely upon its findings: first, that the cost to Penn Central of operating the Terminal building itself, exclusive of purely railroad operations, exceeded the revenues received from concessionaires and tenants in the Terminal; and second, that the special transferable development rights afforded Penn Central as an owner of a landmark site did not "provide compensation to plaintiffs or minimize the harm suffered by plaintiffs due to the designation of the Terminal as a landmark."

introduced at trial—"Statements of Revenues and Costs," purporting to show a net operating loss for the years 1969 and 1971, which were prepared for the instant litigation—had not satisfied their burden.[21] First, the court rejected the claim that these statements showed that the Terminal was operating at a loss, for in the court's view, appellants had improperly attributed some railroad operating expenses and taxes to their real estate operations, and compounded that error by failing to impute any rental value to the vast space in the Terminal devoted to railroad purposes. Further, the Appellate Division concluded that appellants had failed to establish either that they were unable to increase the Terminal's commercial income by transforming vacant or underutilized space to revenue-producing use, or that the unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites.[22] The Appellate Division concluded that all appellants had succeeded in showing was that they had been deprived of the property's most profitable use, and that this showing did not establish that appellants had been unconstitutionally deprived of their property.

The New York Court of Appeals affirmed. 42 N. Y. 2d 324, 366 N. E. 2d 1271 (1977). That court summarily rejected any claim that the Landmarks Law had "taken"

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[21] These statements appear to have reflected the costs of maintaining the exterior architectural features of the Terminal in "good repair" as required by the law. As would have been apparent in any case therefore, the existence of the duty to keep up the property was here—and will presumably always be—factored into the inquiry concerning the constitutionality of the landmark restrictions.

The Appellate Division also rejected the claim that an agreement of Penn Central with the Metropolitan Transit Authority and the Connecticut Transit Authority provided a basis for invalidating the application of the Landmarks Law.

[22] The record reflected that Penn Central had given serious consideration to transferring some of those rights to either the Biltmore Hotel or the Roosevelt Hotel.

property without "just compensation," *id.*, at 329, 366 N. E. 2d, at 1274, indicating that there could be no "taking" since the law had not transferred control of the property to the city, but only restricted appellants' exploitation of it. In that circumstance, the Court of Appeals held that appellants' attack on the law could prevail only if the law deprived appellants of their property in violation of the Due Process Clause of the Fourteenth Amendment. Whether or not there was a denial of substantive due process turned on whether the restrictions deprived Penn Central of a "reasonable return" on the "privately created and privately managed ingredient" of the Terminal. *Id.*, at 328, 366 N. E. 2d, at 1273.[23] The Court of Appeals concluded that the Landmarks Law had not effected a denial of due process because: (1) the landmark regulation permitted the same use as had been made of the Terminal for more than half a century; (2) the appellants had failed to show that they could not earn a reasonable return on their investment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area, which include hotels and office buildings, must realistically be imputed to the Terminal; and

[23] The Court of Appeals suggested that in calculating the value of the property upon which appellants were entitled to earn a reasonable return, the "publicly created" components of the value of the property—*i. e.*, those elements of its value attributable to the "efforts of organized society" or to the "social complex" in which the Terminal is located—had to be excluded. However, since the record upon which the Court of Appeals decided the case did not, as that court recognized, contain a basis for segregating the privately created from the publicly created elements of the value of the Terminal site and since the judgment of the Court of Appeals in any event rests upon bases that support our affirmance, see *infra*, this page and 122, we have no occasion to address the question whether it is permissible or feasible to separate out the "social increments" of the value of property. See Costonis, The Disparity Issue: A Context for the *Grand Central Terminal* Decision, 91 Harv. L. Rev. 402, 416–417 (1977).

(4) the development rights above the Terminal, which had been made transferable to numerous sites in the vicinity of the Terminal, one or two of which were suitable for the construction of office buildings, were valuable to appellants and provided "significant, perhaps 'fair,' compensation for the loss of rights above the terminal itself." *Id.*, at 333–336, 366 N. E. 2d, at 1276–1278.

Observing that its affirmance was "[o]n the present record," and that its analysis had not been fully developed by counsel at any level of the New York judicial system, the Court of Appeals directed that counsel "should be entitled to present . . . any additional submissions which, in the light of [the court's] opinion, may usefully develop further the factors discussed." *Id.*, at 337, 366 N. E. 2d, at 1279. Appellants chose not to avail themselves of this opportunity and filed a notice of appeal in this Court. We noted probable jurisdiction. 434 U. S. 983 (1977). We affirm.

II

The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 239 (1897), and, (2), if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment.[24] We need only address the question whether a "taking" has occurred.[25]

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[24] Our statement of the issues is a distillation of four questions presented in the jurisdictional statement:

"Does the social and cultural desirability of preserving historical landmarks through government regulation derogate from the constitutional

[*Footnote 25 is on p. 123*]

A

Before considering appellants' specific contentions, it will be useful to review the factors that have shaped the jurisprudence of the Fifth Amendment injunction "nor shall private property be taken for public use, without just compensation." The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong* v. *United States*, 364 U. S.

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requirement that just compensation be paid for private property taken for public use?

"Is Penn Central entitled to no compensation for that large but unmeasurable portion of the value of its rights to construct an office building over the Grand Central Terminal that is said to have been created by the efforts of 'society as an organized entity'?

"Does a finding that Penn Central has failed to establish that there is no possibility, without exercising its development rights, of earning a reasonable return on all of its remaining properties that benefit in any way from the operations of the Grand Central Terminal warrant the conclusion that no compensation need be paid for the taking of those rights?

"Does the possibility accorded to Penn Central, under the landmark-preservation regulation, of realizing some value at some time by transferring the Terminal development rights to other buildings, under a procedure that is conceded to be defective, severely limited, procedurally complex and speculative, and that requires ultimate discretionary approval by governmental authorities, meet the constitutional requirements of just compensation as applied to landmarks?" Jurisdictional Statement 3–4.

The first and fourth questions assume that there has been a taking and raise the problem whether, under the circumstances of this case, the transferable development rights constitute "just compensation." The second and third questions, on the other hand, are directed to the issue whether a taking has occurred.

[25] As is implicit in our opinion, we do not embrace the proposition that a "taking" can never occur unless government has transferred physical control over a portion of a parcel.

40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958); see *United States* v. *Caltex, Inc.*, 344 U. S. 149, 156 (1952).

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt* v. *Hempstead*, *supra*, at 594. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e. g.*, *United States* v. *Causby*, 328 U. S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused

economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. See, *e. g., United States* v. *Willow River Power Co.*, 324 U. S. 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913) (no property interest can exist in navigable waters); see also *Demorest* v. *City Bank Co.*, 321 U. S. 36 (1944); *Muhlker* v. *Harlem R. Co.*, 197 U. S. 544 (1905); Sax, Takings and the Police Power, 74 Yale L. J. 36, 61–62 (1964).

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow* v. *Cambridge*, 277 U. S. 183, 188 (1928). Zoning laws are, of course, the classic example, see *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926) (prohibition of industrial use); *Gorieb* v. *Fox*, 274 U. S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); *Welch* v. *Swasey*, 214 U. S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See *Goldblatt* v. *Hempstead, supra*, at 592–593, and cases cited; see also *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S. 668, 674 n. 8 (1976).

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm. *Miller* v. *Schoene*, 276 U. S. 272 (1928), is illustrative. In that case, a state entomologist, acting pursuant to a state statute, ordered

the claimants to cut down a large number of ornamental red cedar trees because they produced cedar rust fatal to apple trees cultivated nearby. Although the statute provided for recovery of any expense incurred in removing the cedars, and permitted claimants to use the felled trees, it did not provide compensation for the value of the standing trees or for the resulting decrease in market value of the properties as a whole. A unanimous Court held that this latter omission did not render the statute invalid. The Court held that the State might properly make "a choice between the preservation of one class of property and that of the other" and since the apple industry was important in the State involved, concluded that the State had not exceeded "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id.*, at 279.

Again, *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915), upheld a law prohibiting the claimant from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses. See also *United States* v. *Central Eureka Mining Co., supra* (Government order closing gold mines so that skilled miners would be available for other mining work held not a taking): *Atchison, T. & S. F. R. Co.* v. *Public Utilities Comm'n*, 346 U. S. 346 (1953) (railroad may be required to share cost of constructing railroad grade improvement); *Walls* v. *Midland Carbon Co.*, 254 U. S. 300 (1920) (law prohibiting manufacture of carbon black upheld); *Reinman* v. *Little Rock*, 237 U. S. 171 (1915) (law prohibiting livery stable upheld); *Mugler* v. *Kansas*, 123 U. S. 623 (1887) (law prohibiting liquor business upheld).

Goldblatt v. *Hempstead, supra*, is a recent example. There, a 1958 city safety ordinance banned any excavations below

the water table and effectively prohibited the claimant from continuing a sand and gravel mining business that had been operated on the particular parcel since 1927. The Court upheld the ordinance against a "taking" challenge, although the ordinance prohibited the present and presumably most beneficial use of the property and had, like the regulations in *Miller* and *Hadacheck*, severely affected a particular owner. The Court assumed that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred. It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow* v. *Cambridge, supra;* cf. *Moore* v. *East Cleveland*, 431 U. S. 494, 513–514 (1977) (STEVENS, J., concurring), or perhaps if it has an unduly harsh impact upon the owner's use of the property.

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, *id.*, at 414, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, see *id.*, at 414–415, the Court held that the statute was invalid as effecting a "taking"

without just compensation. See also *Armstrong* v. *United States*, 364 U. S. 40 (1960) (Government's complete destruction of a materialman's lien in certain property held a "taking"); *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908) (if height restriction makes property wholly useless "the rights of property . . . prevail over the other public interest" and compensation is required). See generally Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1229–1234 (1967).

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States* v. *Causby*, 328 U. S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," *Causby* emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." *Id.*, at 262–263, n. 7. See also *Griggs* v. *Allegheny County*, 369 U. S. 84 (1962) (overflights held a taking); *Portsmouth Co.* v. *United States*, 260 U. S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking); *United States* v. *Cress*, 243 U. S. 316 (1917) (repeated floodings of land caused by water project is a taking); but see *YMCA* v. *United States*, 395 U. S. 85 (1969) (damage caused to building when federal officers who were seeking to protect building were attacked by rioters held not a taking). See generally Michelman, *supra*, at 1226–1229; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

B

In contending that the New York City law has "taken" their property in violation of the Fifth and Fourteenth Amendments, appellants make a series of arguments, which, while tailored to the facts of this case, essentially urge that

any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional. Before considering these, we emphasize what is not in dispute. Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, see *New Orleans* v. *Dukes*, 427 U. S. 297 (1976); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 9–10 (1974); *Berman* v. *Parker*, 348 U. S. 26, 33 (1954); *Welch* v. *Swasey*, 214 U. S., at 108, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law. Finally, appellants do not challenge any of the specific factual premises of the decision below. They accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return,[26] and that the transferable development rights afforded appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has effected a "taking."

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[26] Both the Jurisdictional Statement 7–8, n. 7, and Brief for Appellants 8 n. 7 state that appellants are not seeking review of the New York courts' determination that Penn Central could earn a "reasonable return" on its investment in the Terminal. Although appellants suggest in their reply brief that the factual conclusions of the New York courts cannot be sustained unless we accept the rationale of the New York Court of Appeals, see Reply Brief for Appellants 12 n. 15, it is apparent that the findings concerning Penn Central's ability to profit from the Terminal depend in no way on the Court of Appeals' rationale.

They first observe that the airspace above the Terminal is a valuable property interest, citing *United States* v. *Causby*, *supra*. They urge that the Landmarks Law has deprived them of any gainful use of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superjacent airspace, thus entitling them to "just compensation" measured by the fair market value of these air rights.

Apart from our own disagreement with appellants' characterization of the effect of the New York City law, see *infra*, at 134–135, the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch* v. *Swasey*, *supra*, but also in approving those prohibiting both the subjacent, see *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962), and the lateral, see *Gorieb* v. *Fox*, 274 U. S. 603 (1927), development of particular parcels.[27] "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the

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[27] These cases dispose of any contention that might be based on *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—*i. e.*, irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a "taking." Similarly, *Welch*, *Goldblatt*, and *Gorieb* illustrate the fallacy of appellants' related contention that a "taking" must be found to have occurred whenever the land-use restriction may be characterized as imposing a "servitude" on the claimant's parcel.

parcel as a whole—here, the city tax block designated as the "landmark site."

Secondly, appellants, focusing on the character and impact of the New York City law, argue that it effects a "taking" because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915) (87½% diminution in value); cf. *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S., at 674 n. 8, and that the "taking" issue in these contexts is resolved by focusing on the uses the regulations permit. See also *Goldblatt* v. *Hempstead, supra.* Appellants, moreover, also do not dispute that a showing of diminution in property value would not establish a "taking" if the restriction had been imposed as a result of historic-district legislation, see generally *Maher* v. *New Orleans*, 516 F. 2d 1051 (CA5 1975), but appellants argue that New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties.

Stated baldly, appellants' position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a "taking" requiring the payment of "just compensation." Agreement with this argument would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation. We find no merit in it.

It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. See 2 A. Rathkopf, The Law of Zoning and Planning 26–4, and n. 6 (4th ed. 1978). In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city,[28] and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste," Reply Brief for Appellants 22, thus unavoidably singling out individual landowners for disparate and unfair treatment. The argument has a particularly hollow ring in this case. For appellants not only did not seek judicial review of either the designation or of the denials of the certificates of appropriateness and of no exterior effect, but do not even now suggest that the Commission's decisions concerning the Terminal were in any sense arbitrary or unprincipled. But, in

[28] Although the New York Court of Appeals contrasted the New York City Landmarks Law with both zoning and historic-district legislation and stated at one point that landmark laws do not "further a general community plan," 42 N. Y. 2d 324, 330, 366 N. E. 2d 1271, 1274 (1977), it also emphasized that the implementation of the objectives of the Landmarks Law constitutes an "acceptable reason for singling out one particular parcel for different and less favorable treatment." *Ibid.*, 366 N. E. 2d, at 1275. Therefore, we do not understand the New York Court of Appeals to disagree with our characterization of the law.

any event, a landmark owner has a right to judicial review of any Commission decision, and, quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.[29]

Next, appellants observe that New York City's law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City's law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if "just compensation" is not to be afforded. It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck,* of the cedar trees in *Miller* v. *Schoene,* and of the gravel and sand mine in *Goldblatt* v. *Hempstead,* were uniquely burdened by the legislation sustained in those cases.[30] Similarly, zon-

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[29] When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels. See generally *Nectow* v. *Cambridge,* 277 U. S. 183 (1928). When a property owner challenges a landmark designation or restriction as arbitrary or discriminatory, a similar inquiry presumably will occur.

[30] Appellants attempt to distinguish these cases on the ground that, in each, government was prohibiting a "noxious" use of land and that in the present case, in contrast, appellants' proposed construction above the Terminal would be beneficial. We observe that the uses in issue in

ing laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal.[31] Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot

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Hadacheck, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a pa[rt]icular individual." Sax, Takings and the Police Power, 74 Yale L. J. 36, 50 (1964). These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Nor, correlatively, can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful. The suggestion that the beneficial quality of appellants' proposed construction is established by the fact that the construction would have been consistent with applicable zoning laws ignores the development in sensibilities and ideals reflected in landmark legislation like New York City's. Cf. *West Bros. Brick Co.* v. *Alexandria*, 169 Va. 271, 282–283, 192 S. E. 881, 885–886, appeal dismissed for want of a substantial federal question, 302 U. S. 658 (1937).

[31] There are some 53 designated landmarks and 5 historic districts or scenic landmarks in Manhattan between 14th and 59th Streets. See Landmarks Preservation Commission, Landmarks and Historic Districts (1977).

conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in *Miller, Hadacheck, Euclid,* and *Goldblatt.*[32]

Appellants' final broad-based attack would have us treat the law as an instance, like that in *United States* v. *Causby,* in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose. Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft. The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theaters within a specified area, see *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (1976), or a safety regulation prohibiting excavations below a certain level. See *Goldblatt* v. *Hempstead.*

C

Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have established is

[32] It is, of course, true that the fact the duties imposed by zoning and historic-district legislation apply throughout particular physical communities provides assurances against arbitrariness, but the applicability of the Landmarks Law to a large number of parcels in the city, in our view, provides comparable, if not identical, assurances.

that the New York City law is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now must consider whether the interference with appellants' property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 413. That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

Unlike the governmental acts in *Goldblatt*, *Miller*, *Causby*, *Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects.[33] First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an

[33] Appellants, of course, argue at length that the transferable development rights, while valuable, do not constitute "just compensation." Brief for Appellants 36–43.

office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material, and character with [the Terminal]." Record 2251. Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal.[34]

Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal,[35] the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. Cf. *Goldblatt* v. *Hempstead,* 369 U. S., at 594 n. 3.

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[34] Counsel for appellants admitted at oral argument that the Commission has not suggested that it would not, for example, approve a 20-story office tower along the lines of that which was part of the original plan for the Terminal. See Tr. of Oral Arg. 19.

[35] See Costonis, *supra* n. 2, at 585–589.

On this record, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.[36]

Affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE STEVENS join, dissenting.

Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.[1] The owner of a building might initially be pleased that his property has been chosen by a distinguished committee of architects, historians, and city

[36] We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief. See Tr. of Oral Arg. 42–43.

[1] A large percentage of the designated landmarks are public structures (such as the Brooklyn Bridge, City Hall, the Statue of Liberty and the Municipal Asphalt Plant) and thus do not raise Fifth Amendment taking questions. See Landmarks Preservation Commission of the City of New York, Landmarks and Historic Districts (1977 and Jan. 10, 1978, Supplement). Although the Court refers to the New York ordinance as a *comprehensive* program to preserve *historic* landmarks, *ante*, at 107, the ordinance is not limited to historic buildings and gives little guidance to the Landmarks Preservation Commission in its selection of landmark sites. Section 207–1.0 (n) of the Landmarks Preservation Law, as set forth in N. Y. C. Admin. Code, ch. 8–A (1976), requires only that the selected landmark be at least 30 years old and possess "a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation."

planners for such a singular distinction. But he may well discover, as appellant Penn Central Transportation Co. did here, that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation. The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

Only in the most superficial sense of the word can this case be said to involve "zoning." [2] Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring

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[2] Even the New York Court of Appeals conceded that "[t]his is not a zoning case. . . . Zoning restrictions operate to advance a comprehensive community plan for the common good. Each property owner in the zone is both benefited and restricted from exploitation, presumably without discrimination, except for permitted continuing nonconforming uses. The restrictions may be designed to maintain the general character of the area, or to assure orderly development, objectives inuring to the benefit of all, which property owners acting individually would find difficult or impossible to achieve . . . .

"Nor does this case involve landmark regulation of a historic district. . . . [In historic districting, as in traditional zoning,] owners although burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan.

. . . . .

"Restrictions on alteration of individual landmarks are not designed to further a general community plan. Landmark restrictions are designed to prevent alteration or demolition of a single piece of property. To this extent, such restrictions resemble 'discriminatory' zoning restrictions, properly condemned . . . ." 42 N. Y. 2d 324, 329–330, 366 N. E. 2d 1271, 1274 (1977).

properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), there is "an average reciprocity of advantage."

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. Unlike the regime affected by the latter, the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark* at his own expense. To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different. The rubric of "zoning" has not yet sufficed to avoid the well-established proposition that the Fifth Amendment bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960). See discussion *infra*, at 147–150.

In August 1967, Grand Central Terminal was designated a landmark over the objections of its owner Penn Central. Immediately upon this designation, Penn Central, like all

owners of a landmark site, was placed under an affirmative duty, backed by criminal fines and penalties, to keep "exterior portions" of the landmark "in good repair." Even more burdensome, however, were the strict limitations that were thereupon imposed on Penn Central's use of its property. At the time Grand Central was designated a landmark, Penn Central was in a precarious financial condition. In an effort to increase its sources of revenue, Penn Central had entered into a lease agreement with appellant UGP Properties, Inc., under which UGP would construct and operate a multistory office building cantilevered above the Terminal building. During the period of construction, UGP would pay Penn Central $1 million per year. Upon completion, UGP would rent the building for 50 years, with an option for another 25 years, at a guaranteed *minimum* rental of $3 million per year. The record is clear that the proposed office building was in full compliance with all New York zoning laws and height limitations. Under the Landmarks Preservation Law, however, appellants could not construct the proposed office building unless appellee Landmarks Preservation Commission issued either a "Certificate of No Exterior Effect" or a "Certificate of Appropriateness." Although appellants' architectural plan would have preserved the facade of the Terminal, the Landmarks Preservation Commission has refused to approve the construction.

I

The Fifth Amendment provides in part: "nor shall private property be taken for public use, without just compensation." [3]

[3] The guarantee that private property shall not be taken for public use without just compensation is applicable to the States through the Fourteenth Amendment. Although the state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation." *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236 (1897).

In a very literal sense, the actions of appellees violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its "air rights" over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in *any* form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which appellants, despite good-faith attempts, have so far been unable to obtain. Because the Taking Clause of the Fifth Amendment has not always been read literally, however, the constitutionality of appellees' actions requires a closer scrutiny of this Court's interpretation of the three key words in the Taking Clause—"property," "taken," and "just compensation." [4]

A

Appellees do not dispute that valuable property rights have been destroyed. And the Court has frequently emphasized that the term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945). The term is not used in the

> "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the *group of rights* inhering in the citizen's relation to the physical thing, *as*

[4] The Court's opinion touches base with, or at least attempts to touch base with, most of the major eminent domain cases decided by this Court. Its use of them, however, is anything but meticulous. In citing to *United States* v. *Caltex, Inc.*, 344 U. S. 149, 156 (1952), for example, *ante*, at 124, the only language remotely applicable to eminent domain is stated in terms of "the destruction of respondents' terminals by a trained team of engineers in the face of their impending seizure by the enemy." 344 U. S., at 156.

> *the right to possess, use and dispose of it.* . . . The constitutional provision is addressed to *every sort of interest* the citizen may possess." *Id.*, at 377–378 (emphasis added).

While neighboring landowners are free to use their land and "air rights" in any way consistent with the broad boundaries of New York zoning, Penn Central, absent the permission of appellees, must forever maintain its property in its present state.[5] The property has been thus subjected to a nonconsensual servitude not borne by any neighboring or similar properties.[6]

B

Appellees have thus destroyed—in a literal sense, "taken"—substantial property rights of Penn Central. While the term "taken" might have been narrowly interpreted to include only physical seizures of property rights, "the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *Id.*, at 378. See also *United States* v. *Lynah*, 188 U. S. 445, 469

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[5] In particular, Penn Central cannot increase the height of the Terminal. This Court has previously held that the "air rights" over an area of land are "property" for purposes of the Fifth Amendment. See *United States* v. *Causby*, 328 U. S. 256 (1946) ("air rights" taken by low-flying airplanes); *Griggs* v. *Allegheny County*, 369 U. S. 84 (1962) (same); *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327 (1922) (firing of projectiles over summer resort can constitute taking). See also *Butler* v. *Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716 (1906) (stringing of telephone wire across property constitutes a taking).

[6] It is, of course, irrelevant that appellees interfered with or destroyed property rights that Penn Central had not yet physically used. The Fifth Amendment must be applied with "reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, *or such as may be reasonably expected in the immediate future.*" *Boom Co.* v. *Patterson*, 98 U. S. 403, 408 (1879) (emphasis added).

(1903);[7] *Dugan* v. *Rank*, 372 U. S. 609, 625 (1963). Because "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," *Armstrong* v. *United States*, 364 U. S., at 48, however, this does not end our inquiry. But an examination of the two exceptions where the destruction of property does *not* constitute a taking demonstrates that a compensable taking has occurred here.

1

As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use.

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be *injurious to the health, morals, or safety of the community*, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, *by reason of their not being permitted, by a noxious use of*

[7] "Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." 188 U. S., at 470.

> *their property, to inflict injury upon the community." Mugler* v. *Kansas,* 123 U. S. 623, 668–669.

Thus, there is no "taking" where a city prohibits the operation of a brickyard within a residential area, see *Hadacheck* v. *Sebastian,* 239 U. S. 394 (1915), or forbids excavation for sand and gravel below the water line, see *Goldblatt* v. *Hempstead,* 369 U. S. 590 (1962). Nor is it relevant, where the government is merely prohibiting a noxious use of property, that the government would seem to be singling out a particular property owner. *Hadacheck, supra,* at 413.[8]

The nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others. Thus, in *Curtin* v. *Benson,* 222 U. S. 78 (1911), the Court held that the Government, in prohibiting the owner of property within the boundaries of Yosemite National Park from grazing cattle on his property, had taken the owner's property. The Court assumed that the Government could constitutionally require the owner to fence his land or take other action to prevent his cattle from straying onto others' land without compensating him.

> "Such laws might be considered as strictly regulations of the use of property, of so using it that no injury could result to others. They would have the effect of making the owner of land herd his cattle on his own land and of making him responsible for a neglect of it." *Id.,* at 86.

The prohibition in question, however, was "not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership." *Ibid.*

Appellees are not prohibiting a nuisance. The record is

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[8] Each of the cases cited by the Court for the proposition that legislation which severely affects some landowners but not others does not effect a "taking" involved noxious uses of property. See *Hadacheck; Miller* v. *Schoene,* 276 U. S. 272 (1928); *Goldblatt.* See *ante,* at 125–127, 133.

clear that the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements. Instead, appellees are seeking to preserve what they believe to be an outstanding example of beaux arts architecture. Penn Central is prevented from further developing its property basically because *too good* a job was done in designing and building it. The city of New York, because of its unadorned admiration for the design, has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.

Unlike land-use regulations, appellees' actions do not merely *prohibit* Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an *affirmative* duty on Penn Central to maintain the Terminal in its present state and in "good repair." Appellants are not free to use their property as they see fit within broad outer boundaries but must strictly adhere to their past use except where appellees conclude that alternative uses would not detract from the landmark. While Penn Central may continue to use the Terminal as it is presently designed, appellees otherwise "exercise complete dominion and control over the surface of the land," *United States* v. *Causby*, 328 U. S. 256, 262 (1946), and must compensate the owner for his loss. *Ibid.* "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States* v. *Dickinson*, 331 U. S. 745, 748 (1947). See also *Dugan* v. *Rank*, *supra*, at 625.[9]

[9] In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893), the Monangahela company had expended large sums of money in improving the Monongahela River by means of locks and dams. When the United States condemned this property for its own use, the Court held that full compensation had to be awarded. "Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress

2

Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "secure[s] an average reciprocity of advantage." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 415.[10] It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. The Fifth Amendment

> "prevents the public from loading upon one individual more than his just share of the burdens of government,

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to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt." *Id.*, at 337. Under the Court's rationale, however, where the Government wishes to preserve a pre-existing canal system for public use, it need not condemn the property but need merely order that it be preserved in its present form and be kept "in good repair."

[10] Appellants concede that the preservation of buildings of historical or aesthetic importance is a permissible objective of state action. Brief for Appellants 12. Cf. *Berman* v. *Parker*, 348 U. S. 26 (1954); *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668 (1896).

For the reasons noted in the text, historic *zoning*, as has been undertaken by cities such as New Orleans, may well not require compensation under the Fifth Amendment.

> and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 325 (1893).

Less than 20 years ago, this Court reiterated that the

> "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S., at 49.

Cf. *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 428–430 (1935).[11]

As Mr. Justice Holmes pointed out in *Pennsylvania Coal Co.* v. *Mahon*, "the question at bottom" in an eminent domain case "is upon whom the loss of the changes desired should fall." 260 U. S., at 416. The benefits that appellees believe will flow from preservation of the Grand Central Terminal will accrue to all the citizens of New York City. There is no reason to believe that appellants will enjoy a substantially greater share of these benefits. If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would

[11] "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. . . . While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment, . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them." 294 U. S., at 429–430.

surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.[12]

Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property.[13] The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. See, *e. g., United States* v. *Lynah,* 188 U. S., at 470. But the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. "[I]t is the character of the invasion, not the amount of damage resulting from it,

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[12] The fact that the Landmarks Preservation Commission may have allowed additions to a relatively few landmarks is of no comfort to appellants. *Ante,* at 118 n. 18. Nor is it of any comfort that the Commission refuses to allow appellants to construct any additional stories because of their belief that such construction would not be aesthetic. *Ante,* at 117–118.

[13] Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), but the Court must define the particular property unit that should be examined. For example, in this case, if appellees are viewed as having restricted Penn Central's use of its "air rights," *all* return has been denied. See *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922). The Court does little to resolve these questions in its opinion. Thus, at one point, the Court implies that the question is whether the restrictions have "an unduly harsh impact upon the owner's use of the property," *ante,* at 127; at another point, the question is phrased as whether Penn Central can obtain "a 'reasonable return' on its investment," *ante,* at 136; and, at yet another point, the question becomes whether the landmark is "economically viable," *ante,* at 138 n. 36.

so long as the damage is substantial, that determines the question whether it is a taking." *United States* v. *Cress*, 243 U. S. 316, 328 (1917); *United States* v. *Causby*, 328 U. S., at 266. See also *Goldblatt* v. *Hempstead*, 369 U. S., at 594.

C

Appellees, apparently recognizing that the constraints imposed on a landmark site constitute a taking for Fifth Amendment purposes, do not leave the property owner empty-handed. As the Court notes, *ante*, at 113–114, the property owner may theoretically "transfer" his previous right to develop the landmark property to adjacent properties if they are under his control. Appellees have coined this system "Transfer Development Rights," or TDR's.

Of all the terms used in the Taking Clause, "just compensation" has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires "a full and perfect equivalent for the property taken." *Monongahela Navigation Co.* v. *United States*, 148 U. S., at 326.

> "[I]f the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken." *Ibid.*

See also *United States* v. *Lynah*, *supra*, at 465; *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 117 (1951). And the determination of whether a "full and perfect equivalent" has been awarded is a "judicial function." *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343–344 (1923). The fact

that *appellees* may believe that TDR's provide full compensation is irrelevant.

> "The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Monongahela Navigation Co.* v. *United States, supra,* at 327.

Appellees contend that, even if they have "taken" appellants' property, TDR's constitute "just compensation." Appellants, of course, argue that TDR's are highly imperfect compensation. Because the lower courts held that there was no "taking," they did not have to reach the question of whether or not just compensation has already been awarded. The New York Court of Appeals' discussion of TDR's gives some support to appellants:

> "The many defects in New York City's program for development rights transfers have been detailed elsewhere . . . . The area to which transfer is permitted is severely limited [and] complex procedures are required to obtain a transfer permit." 42 N. Y. 2d 324, 334–335, 366 N. E. 2d 1271, 1277 (1977).

And in other cases the Court of Appeals has noted that TDR's have an "uncertain and contingent market value" and do "not adequately preserve" the value lost when a building is declared to be a landmark. *French Investing Co.* v. *City of New York,* 39 N. Y. 2d 587, 591, 350 N. E. 2d 381, 383, appeal dismissed, 429 U. S. 990 (1976). On the other hand, there is evidence in the record that Penn Central has been

offered substantial amounts for its TDR's. Because the record on appeal is relatively slim, I would remand to the Court of Appeals for a determination of whether TDR's constitute a "full and perfect equivalent for the property taken." [14]

II

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 416. The Court's opinion in this case demonstrates that the danger thus foreseen has not abated. The city of New York is in a precarious financial state, and some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual tax-

[14] The Court suggests, *ante*, at 131, that if appellees are held to have "taken" property rights of landmark owners, not only the New York City Landmarks Preservation Law, but "all comparable landmark legislation in the Nation," must fall. This assumes, of course, that TDR's are not "just compensation" for the property rights destroyed. It also ignores the fact that many States and cities in the Nation have chosen to preserve landmarks by purchasing or condemning restrictive easements over the facades of the landmarks and are apparently quite satisfied with the results. See, *e. g.*, Ore. Rev. Stat. §§ 271.710, 271.720 (1977); Md. Ann. Code, Art 41, § 181A (1978); Va. Code §§ 10–145.1 and 10–138 (e) (1978); Richmond, Va., City Code § 17–23 *et seq.* (1975). The British National Trust has effectively used restrictive easements to preserve landmarks since 1937. See National Trust Act, 1937, 1 Edw. 8 and 1 Geo. 6 ch. lvii, §§ 4 and 8. Other States and cities have found that tax incentives are also an effective means of encouraging the private preservation of landmark sites. See, *e. g.*, Conn. Gen. Stat. § 12–127a (1977); Ill. Rev. Stat., ch. 24, § 11–48.2–6 (1976); Va. Code § 10–139 (1978). The New York City Landmarks Preservation Law departs drastically from these traditional, and constitutional, means of preserving landmarks.

payers of New York. But these concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change.

FRANKS *v.* DELAWARE

CERTIORARI TO THE SUPREME COURT OF DELAWARE

No. 77-5176. Argued February 27, 1978—Decided June 26, 1978

Prior to petitioner's Delaware state trial on rape and related charges and in connection with his motion to suppress on Fourth Amendment grounds items of clothing and a knife found in a search of his apartment, he challenged the truthfulness of certain factual statements made in the police affidavit supporting the warrant to search the apartment, and sought to call witnesses to prove the misstatements. The trial court sustained the State's objection to such proposed testimony and denied the motion to suppress, and the clothing and knife were admitted as evidence at the ensuing trial, at which petitioner was convicted. The Delaware Supreme Court affirmed, holding that a defendant under *no* circumstances may challenge the veracity of a sworn statement used by police to procure a search warrant. *Held:* Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request. The trial court here therefore erred in refusing to examine the adequacy of petitioner's proffer of misrepresentation in the warrant affidavit. Pp. 155–156; 164–172.

(a) To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. The allegation of deliberate falsehood or of reckless disregard must point out specifically with supporting reasons the portion of the warrant affidavit that is claimed to be false. It also must be accompanied by an offer of proof, including affidavits or sworn or otherwise reliable statements of witnesses, or a satisfactory explanation of their absence. P. 171.

(b) If these requirements as to allegations and offer of proof are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required, but if the remaining content is insufficient, the defendant is entitled under the Fourth and Fourteenth Amendments to a hearing. Pp. 171–172.

(c) If, after a hearing, a defendant establishes by a preponderance of the evidence that the false statement was included in the affidavit by the affiant knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit. Pp. 155–156.

373 A. 2d 578, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined, REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 180.

Donald W. Huntley argued the cause and filed briefs for petitioner.

Harrison F. Turner, Deputy Attorney General of Delaware, argued the cause for respondent. With him on the brief was *Richard R. Wier, Jr.*, Attorney General.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents an important and longstanding issue of Fourth Amendment law. Does a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?

In the present case the Supreme Court of Delaware held, as a matter of first impression for it, that a defendant under *no* circumstances may so challenge the veracity of a sworn statement used by police to procure a search warrant. We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was

*Briefs of *amici curiae* were filed by *Solicitor General McCree, Assistant Attorney General Civiletti, Kenneth S. Geller, Jerome M. Feit,* and *Paul J. Brysh* for the United States, and by *Bruce J. Ennis* for the American Civil Liberties Union.

included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

I

The controversy over the veracity of the search warrant affidavit in this case arose in connection with petitioner Jerome Franks' state conviction for rape, kidnaping, and burglary. On Friday, March 5, 1976, Mrs. Cynthia Bailey told police in Dover, Del., that she had been confronted in her home earlier that morning by a man with a knife, and that he had sexually assaulted her. She described her assailant's age, race, height, build, and facial hair, and gave a detailed description of his clothing as consisting of a white thermal undershirt, black pants with a silver or gold buckle, a brown leather three-quarter-length coat, and a dark knit cap that he wore pulled down around his eyes.

That same day, petitioner Franks coincidentally was taken into custody for an assault involving a 15-year-old girl, Brenda B. ——, six days earlier. After his formal arrest, and while awaiting a bail hearing in Family Court, petitioner allegedly stated to Robert McClements, the youth officer accompanying him, that he was surprised the bail hearing was "about Brenda B. ——. I know her. I thought you said Bailey. I don't know her." Tr. 175, 186. At the time of this statement, the police allegedly had not yet recited to petitioner his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

On the following Monday, March 8, Officer McClements happened to mention the courthouse incident to a detective, Ronald R. Brooks, who was working on the Bailey case. Tr. 186, 190–191. On March 9, Detective Brooks and Detective Larry D. Gray submitted a sworn affidavit to a Justice of the Peace in Dover, in support of a warrant to search petitioner's apartment.[1] In paragraph 8 of the affidavit's "probable cause page" mention was made of petitioner's statement to McClements. In paragraph 10, it was noted that the description of the assailant given to the police by Mrs. Bailey included the above-mentioned clothing. Finally, the affidavit also described the attempt made by police to confirm that petitioner's typical outfit matched that of the assailant. Paragraph 15 recited: "On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people." Paragraphs 16 and 17 respectively stated: "Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket," and "Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat."

The warrant was issued on the basis of this affidavit. App. 9. Pursuant to the warrant, police searched petitioner's apartment and found a white thermal undershirt, a knit hat, dark pants, and a leather jacket, and, on petitioner's kitchen table, a single-blade knife. All these ultimately were introduced in evidence at trial.

Prior to the trial, however, petitioner's counsel filed a written motion to suppress the clothing and the knife found in the search; this motion alleged that the warrant on its face did not show probable cause and that the search and seizure were

[1] The affidavit is reproduced as Appendix A to this opinion. *Post*, at 172.

in violation of the Fourth and Fourteenth Amendments. *Id.*, at 11–12. At the hearing on the motion to suppress, defense counsel orally amended the challenge to include an attack on the veracity of the warrant affidavit; he also specifically requested the right to call as witnesses Detective Brooks, Wesley Lucas of the Youth Center, and James D. Morrison, formerly of the Youth Center.[2] *Id.*, at 14–17. Counsel asserted that Lucas and Morrison would testify that neither had been personally interviewed by the warrant affiants, and that, although they might have talked to another police officer, any information given by them to that officer was "somewhat different" from what was recited in the affidavit. *Id.*, at 16. Defense counsel charged that the misstatements were included in the affidavit not inadvertently, but in "bad faith." *Id.*, at 25. Counsel also sought permission to call Officer McClements and petitioner as witnesses, to seek to establish that petitioner's courthouse statement to police had been obtained in violation of petitioner's *Miranda* rights, and that the search warrant was thereby tainted as the fruit of an illegally obtained confession. *Id.*, at 17, 27.

In rebuttal, the State's attorney argued in detail, App. 15–24, (a) that Del. Code Ann., Tit. 11, §§ 2306, 2307 (1974), contemplated that any challenge to a search warrant was to be limited to questions of sufficiency based on the face of the affidavit; (b) that, purportedly, a majority of the States whose

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[2] The references in paragraphs 15 and 16 of the warrant affidavit's probable-cause page to "James Williams" appear to have been intended as references to James D. Morrison, who was petitioner's supervisor at the Youth Center. Tr. 269. This misapprehension on the part of the State continued until shortly before trial. Eleven days prior to trial, the prosecution requested the Clerk of the Kent County Superior Court to summon "James Williams, Delaware Youth Center," for petitioner's trial. In his return on the summons, Record Doc. No. 16, the Kent County Sheriff stated that he "[s]erved the within summons upon . . . James Williams (Morrison)." The summons actually delivered was made out in the name of James Morrison.

practice was not dictated by statute observed such a rule;[3] and (c) that federal cases on the issue were to be distinguished because of Fed. Rule Crim. Proc. 41 (e).[4] He also noted that

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[3] It appears this is no longer the majority rule among the States. Compare Comment, 7 Seton Hall L. Rev. 827, 844 (1976) (about half of the States have addressed the issue, and the weight of authority is "slightly in favor" of permitting veracity challenges), with *North Carolina* v. *Wrenn*, 417 U. S. 973 (1974) (WHITE, J., dissenting from denial of certiorari) (majority of state decisions prohibit subsequent impeachment of an affidavit).

By our count, 19 States, and perhaps as many as 21, permit veracity challenges; 5 of these apparently rely on statutory provisions in so holding. Five States have disposed of particular veracity challenges on the ground there was no misstatement, or that any misstatement was immaterial or unintentional, without opining what would be done when there is a deliberate and material misrepresentation. There are now only 11 States that prohibit veracity challenges outright. Another two have barred impeachment challenges that seemed directed at the conclusory nature of affidavit allegations rather than at their veracity.

The case law is detailed in Appendix B. *Post*, at 176.

[4] This reasoning is misplaced. The Federal Courts of Appeals decisions allowing a defendant to challenge the veracity of a warrant affidavit rest on a constitutional footing. See *United States* v. *Belculfine*, 508 F. 2d 58, 61, 63 (CA1 1974); *United States* v. *Dunnings*, 425 F. 2d 836, 839–840 (CA2 1969), cert. denied, 397 U. S. 1002 (1970); *United States* v. *Armocida*, 515 F. 2d 29, 41 (CA3), cert. denied *sub nom. Gazal* v. *United States*, 423 U. S. 858 (1975); *United States* v. *Lee*, 540 F. 2d 1205, 1208–1209 (CA4), cert. denied, 429 U. S. 894 (1976); *United States* v. *Thomas*, 489 F. 2d 664, 668, 671 (CA5 1973), cert. denied, 423 U. S. 844 (1975); *United States* v. *Luna*, 525 F. 2d 4, 8 (CA6 1975), cert. denied, 424 U. S. 965 (1976); *United States* v. *Carmichael*, 489 F. 2d 983, 988–989 (CA7 1973) (en banc); *United States* v. *Marihart*, 492 F. 2d 897, 898 (CA8), cert. denied, 419 U. S. 827 (1974); *United States* v. *Damitz*, 495 F. 2d 50, 54–56 (CA9 1974); *United States* v. *Harwood*, 470 F. 2d 322, 324–325 (CA10 1972).

Of all the Federal Courts of Appeals, only one now apparently refrains from permitting challenges to affidavit veracity. See *United States* v. *Watts*, 176 U. S. App. D. C. 314, 317–318 n. 5, 540 F. 2d 1093, 1096–1097 n. 5 (1976); *United States* v. *Branch*, 178 U. S. App. D. C. 99, 102 n. 2, 545 F. 2d 177, 180 n. 2 (1976).

this Court had reserved the general issue of subfacial challenge to veracity in *Rugendorf* v. *United States*, 376 U. S. 528, 531–532 (1964), when it disposed of that case on the ground that, even if a veracity challenge were permitted, the alleged factual inaccuracies in that case's affidavit "were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." *Id.*, at 532. The State objected to petitioner's "going behind [the warrant affidavit] in any way," and argued that the court must decide petitioner's motion "on the four corners" of the affidavit. App. 21.

The trial court sustained the State's objection to petitioner's proposed evidence. *Id.*, at 25, 27. The motion to suppress was denied, and the clothing and knife were admitted as evidence at the ensuing trial. Tr. 192–196. Petitioner was convicted. In a written motion for judgment of acquittal and/or new trial, Record Doc. No. 23, petitioner repeated his objection to the admission of the evidence, stating that he "should have been allowed to impeach the Affidavit used in the Search Warrant to show purposeful misrepresentation of information contained therein." *Id.*, at 2. The motion was denied, and petitioner was sentenced to two consecutive terms of 25 years each and an additional consecutive life sentence.

On appeal, the Supreme Court of Delaware affirmed. 373 A. 2d 578 (1977). It agreed with what it deemed to be the "majority rule" that no attack upon the veracity of a warrant affidavit could be made:

> "We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are

more properly considered in a trial on the merits." *Id.*, at 580.

Because of this resolution, the Delaware Supreme Court noted that there was no need to consider petitioner's "other contentions, relating to the evidence that would have been introduced for impeachment purposes." *Ibid.*

Franks' petition for certiorari presented only the issue whether the trial court had erred in refusing to consider his allegation of misrepresentation in the warrant affidavit.[5] Because of the importance of the question, and because of the conflict among both state and federal courts, we granted certiorari. 434 U. S. 889 (1977).

II

It may be well first to note how we are compelled to reach the Fourth Amendment issue proffered in this case. In particular, the State's proposals of an independent and adequate state ground and of harmless error do not dispose of the controversy.

Respondent argues that petitioner's trial counsel, who is not the attorney representing him in this Court, failed to include the challenge to the veracity of the warrant affidavit in the written motion to suppress filed before trial, contrary to the requirement of Del. Super. Ct. Rule Crim. Proc. 41 (e) that a motion to suppress "shall state the grounds upon which it is made." The Supreme Court of Delaware, however, disposed of petitioner's Fourth Amendment claim on the merits. A ruling on the merits of a federal question by the highest state court leaves the federal question open to review

[5] Franks did not raise in his petition the issue of his *Miranda* challenge to the courthouse statement given to police and the use of that statement in the warrant affidavit. The propriety of the trial court's refusal to hear testimony on that subject is therefore not before us. It also appears that Franks did not take that issue to the Supreme Court of Delaware. See Opening Brief for Appellant, No. 259, 1976 (Del. Sup. Ct.).

in this Court. *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134 (1914); *Raley* v. *Ohio*, 360 U. S. 423, 436–437 (1959); *Boykin* v. *Alabama*, 395 U. S. 238, 241–242 (1969).

Respondent next suggests that any error here was harmless. Assuming, *arguendo*, respondent says, that petitioner's Fourth Amendment claim was valid, and that the warrant should have been tested for veracity and the evidence excluded, it is still clear beyond a reasonable doubt that the evidence complained of did not contribute to petitioner's conviction. *Chambers* v. *Maroney*, 399 U. S. 42, 52–53 (1970). This contention falls of its own weight. The sole issue at trial was that of consent. Petitioner admitted, App. 37, that he had engaged in sexual relations with Mrs. Bailey on the day in question. She testified, Tr. 50–51, 69–70, that she had not consented to this, and that petitioner, upon first encountering her in the house, had threatened her with a knife to force her to submit. Petitioner claimed that she had given full consent and that no knife had been present. *Id.*, at 254, 271. To corroborate its contention that consent was lacking, the State introduced in evidence a stainless steel, wooden-handled kitchen knife found by the detectives on the kitchen table in petitioner's apartment four days after the alleged rape. *Id.*, at 195–196; Magistrate's Return on the Search Warrant March 9, 1976, Record Doc. No. 23. Defense counsel objected to its admission, arguing that Mrs. Bailey had not given any detailed description of the knife alleged to be involved in the incident and had claimed to have seen the knife only in "pitch blackness." Tr. 195. The State obtained its admission, however, as a knife that matched the description contained in the search warrant, and Mrs. Bailey testified that the knife allegedly used was, like the knife in evidence, single-edged and not a pocket knife, and that the knife in evidence was the same length and thickness as the knife used in the crime. *Id.*, at 69, 114–115. The State carefully elicited from Detective Brooks the fact that this was the only knife found in petitioner's

apartment. *Id.*, at 196. Although respondent argues that the knife was presented to the jury as "merely exemplary of the generic class of weapon testimonially described by the victim," Brief for Respondent 15–16, the State at trial clearly meant to suggest that this was the knife that had been used against Mrs. Bailey. Had the warrant been quashed, and the knife excluded from the trial as evidence, we cannot say with any assurance that the jury would have reached the same decision on the issue of consent, particularly since there was countervailing evidence on that issue.

We should note, in addition, why this case cannot be treated as was the situation in *Rugendorf* v. *United States.* There the Court held that no Fourth Amendment question was presented when the claimed misstatements in the search warrant affidavit "were of only peripheral relevancy to the showing of probable cause, *and,* not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." 376 U. S., at 532 (emphasis added). *Rugendorf* emphasized that the "erroneous statements . . . were not those of the affiant" and thus "fail[ed] to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant." *Id.*, at 533.[6] Here,

[6] The *Rugendorf* affidavit, sworn to by FBI Special Agent Moore, contained two alleged inaccuracies: a double hearsay statement that petitioner Samuel Rugendorf was the manager of Rugendorf Brothers Meat Market, and a double hearsay statement that he was associated with his brother, Leo, in the meat business. As to the second, the affidavit stated that a confidential informant told FBI Special Agent McCormick about the Rugendorf brothers' association, and McCormick told affiant Moore. As to the first, the affidavit stated that the information was given by Chicago Police Officer Kelleher to Special Agent McCormick, who in turn relayed it to affiant Moore. Kelleher testified that he did not so inform McCormick, but the petitioner in *Rugendorf* had failed to pursue the discrepancy: He did not seek a deposition from McCormick, who was in the hospital at the time of trial, and did not seek a postponement to enable McCormick to be present. 376 U. S., at 533 n. 4. In characterizing the affidavit in *Rugendorf* as raising no question of integrity, the Court took as its premise

whatever the judgment may be as to the relevancy of the alleged misstatements, the integrity of the affidavit was directly placed in issue by petitioner in his allegation that the affiants did not, as claimed, speak directly to Lucas and Morrison. Whether such conversations took place is surely a matter "within the personal knowledge of the affiant[s]." We also might note that although respondent's brief puts forth that the alleged misrepresentations in the affidavit were of little importance in establishing probable cause, Brief for Respondent 16, respondent at oral argument appeared to disclaim any reliance on *Rugendorf*. Tr. of Oral Arg. 30.

III

Whether the Fourth and Fourteenth Amendments, and the derivative exclusionary rule made applicable to the States under *Mapp* v. *Ohio*, 367 U. S. 643 (1961), ever mandate that a defendant be permitted to attack the veracity of a warrant affidavit after the warrant has been issued and executed, is a question that encounters conflicting values. The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search. In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." Judge Frankel, in *United States* v. *Halsey*, 257 F. Supp. 1002, 1005 (SDNY 1966), aff'd, Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a

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that police could not insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity.

truthful showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law, see *Nathanson* v. *United States,* 290 U. S. 41, 47 (1933); *Giordenello* v. *United States,* 357 U. S. 480, 485–486 (1958); *Aguilar* v. *Texas,* 378 U. S. 108, 114–115 (1964), that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.'" *Id.,* at 114. Because it is the magistrate who must determine independently whether there is probable cause, *Johnson* v. *United States,* 333 U. S. 10, 13–14 (1948); *Jones* v. *United States,* 362 U. S. 257, 270–271 (1960), it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment.

In saying this, however, one must give cognizance to competing values that lead us to impose limitations. They perhaps can best be addressed by noting the arguments of respondent and others against allowing veracity challenges. The arguments are several:

First, respondent argues that the exclusionary rule, created in *Weeks* v. *United States,* 232 U. S. 383 (1914), is not a

personal constitutional right, but only a judicially created remedy extended where its benefit as a deterrent promises to outweigh the societal cost of its use; that the Court has declined to apply the exclusionary rule when illegally seized evidence is used to impeach the credibility of a defendant's testimony, *Walder* v. *United States*, 347 U. S. 62 (1954), is used in a grand jury proceeding, *United States* v. *Calandra*, 414 U. S. 338 (1974), or is used in a civil trial, *United States* v. *Janis*, 428 U. S. 433 (1976); and that the Court similarly has restricted application of the Fourth Amendment exclusionary rule in federal habeas corpus review of a state conviction. See *Stone* v. *Powell*, 428 U. S. 465 (1976). Respondent argues that applying the exclusionary rule to another situation—the deterrence of deliberate or reckless untruthfulness in a warrant affidavit—is not justified for many of the same reasons that led to the above restrictions; interfering with a criminal conviction in order to deter official misconduct is a burden too great to impose on society.

Second, respondent argues that a citizen's privacy interests are adequately protected by a requirement that applicants for a warrant submit a sworn affidavit and by the magistrate's independent determination of sufficiency based on the face of the affidavit. Applying the exclusionary rule to attacks upon veracity would weed out a minimal number of perjurious government statements, says respondent, but would overlap unnecessarily with existing penalties against perjury, including criminal prosecutions, departmental discipline for misconduct, contempt of court, and civil actions.

Third, it is argued that the magistrate already is equipped to conduct a fairly vigorous inquiry into the accuracy of the factual affidavit supporting a warrant application. He may question the affiant, or summon other persons to give testimony at the warrant proceeding. The incremental gain from a post-search adversary proceeding, it is said, would not be great.

Fourth, it is argued that it would unwisely diminish the solemnity and moment of the magistrate's proceeding to make his inquiry into probable cause reviewable in regard to veracity. The less final, and less deference paid to, the magistrate's determination of veracity, the less initiative will he use in that task. Denigration of the magistrate's function would be imprudent insofar as his scrutiny is the last bulwark preventing any particular invasion of privacy before it happens.

Fifth, it is argued that permitting a post-search evidentiary hearing on issues of veracity would confuse the pressing issue of guilt or innocence with the collateral question as to whether there had been official misconduct in the drafting of the affidavit. The weight of criminal dockets, and the need to prevent diversion of attention from the main issue of guilt or innocence, militate against such an added burden on the trial courts. And if such hearings were conducted routinely, it is said, they would be misused by defendants as a convenient source of discovery. Defendants might even use the hearings in an attempt to force revelation of the identity of informants.

Sixth and finally, it is argued that a post-search veracity challenge is inappropriate because the accuracy of an affidavit in large part is beyond the control of the affiant. An affidavit may properly be based on hearsay, on fleeting observations, and on tips received from unnamed informants whose identity often will be properly protected from revelation under *McCray* v. *Illinois*, 386 U. S. 300 (1967).

None of these considerations is trivial. Indeed, because of them, the rule announced today has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded. But neither do the considerations cited by respondent and others have a fully controlling weight; we conclude that they are insufficient to justify an *absolute* ban on post-search impeachment of veracity. On this side of the balance, also, there are pressing considerations:

First, a flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning. The requirement that a warrant not issue "but upon probable cause, supported by Oath or affirmation," would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile. It is this specter of intentional falsification that, we think, has evoked such widespread opposition to the flat nonimpeachment rule from the commentators,[7] from the American Law Institute in its Model Code of Pre-Arraignment Procedure, § SS290.3 (1) (Prop. Off. Draft 1975), from the federal courts of appeals, and from state courts. On occasion, of course, an instance of deliberate falsity will be exposed and confirmed without a special inquiry either at trial, see *United States ex rel. Petillo* v. *New Jersey*, 400 F. Supp. 1152, 1171–1172 (NJ 1975), vacated and remanded by order *sub nom. Albanese* v. *Yeager*, 541 F. 2d 275 (CA3 1976), or at a hearing on the sufficiency of the affidavit, cf. *United States* v. *Upshaw*, 448 F. 2d 1218, 1221–1222

[7] Mascolo, Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity, 44 Conn. Bar J. 9, 19, 25–28 (1970); Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev. 825, 830–832 (1971); Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury, 1971 U. Ill. Law Forum 405, 456; Forkosh, The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment, 34 Ohio St. L. J. 297, 306, 308, 340 (1973); Sevilla, The Exclusionary Rule and Police Perjury, 11 San Diego L. Rev. 839, 869 (1974); Herman, Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit, 36 Ohio St. L. J. 721, 738–739, 750 (1975); Note, 15 Buffalo L. Rev. 712, 716–717 (1966); Note, 51 Cornell L. Q. 822, 825–826 (1966); Note, 34 Ford. L. Rev. 740, 745 (1966); Note, 67 Colum. L. Rev. 1529, 1530–1531 (1967); Comment, 19 UCLA L. Rev. 96, 108, 146 (1971); Comment, 63 J. Crim. L., C. & P. S. 41, 48, 50 (1972); Note, 23 Drake L. Rev. 623, 638–639 (1974); Comment, 7 Seton Hall L. Rev. 827, 859–860 (1976).

(CA5 1971), cert. denied, 405 U. S. 934 (1972). A flat non-impeachment rule would bar re-examination of the warrant even in these cases.

Second, the hearing before the magistrate not always will suffice to discourage lawless or reckless misconduct. The pre-search proceeding is necessarily *ex parte,* since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence. The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous. The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations. The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.

Third, the alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap. *Mapp* v. *Ohio* implicitly rejected the adequacy of these alternatives. Mr. Justice Douglas noted this in his concurrence in *Mapp,* 367 U. S., at 670, where he quoted from *Wolf* v. *Colorado,* 338 U. S. 25, 42 (1949): " 'Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.' "

Fourth, allowing an evidentiary hearing, after a suitable preliminary proffer of material falsity, would not diminish the importance and solemnity of the warrant-issuing process. It is the *ex parte* nature of the initial hearing, rather than the magistrate's capacity, that is the reason for the review. A magistrate's determination is presently subject to review before trial as to *sufficiency* without any undue interference

with the dignity of the magistrate's function. Our reluctance today to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard, leaves a broad field where the magistrate is the sole protection of a citizen's Fourth Amendment rights, namely, in instances where police have been merely negligent in checking or recording the facts relevant to a probable-cause determination.

Fifth, the claim that a post-search hearing will confuse the issue of the defendant's guilt with the issue of the State's possible misbehavior is footless. The hearing will not be in the presence of the jury. An issue extraneous to guilt already is examined in any probable-cause determination or review of probable cause. Nor, if a sensible threshold showing is required and sensible substantive requirements for suppression are maintained, need there be any new large-scale commitment of judicial resources; many claims will wash out at an early stage, and the more substantial ones in any event would require judicial resources for vindication if the suggested alternative sanctions were truly to be effective. The requirement of a substantial preliminary showing should suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction. And because we are faced today with only the question of the integrity of the affiant's representations as to his own activities, we need not decide, and we in no way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made. *McCray* v. *Illinois*, 386 U. S. 300 (1967), the Court's earlier disquisition in this area, concluded only that the Due Process Clause of the Fourteenth Amendment did not require the State to expose an informant's identity routinely, upon a defendant's mere demand, when there was ample evidence in the probable-cause hearing to show that the informant was reliable and his information credible.

Sixth and finally, as to the argument that the exclusionary

rule should not be extended to a "new" area, we cannot regard any such extension really to be at issue here. Despite the deep skepticism of Members of this Court as to the wisdom of extending the exclusionary rule to collateral areas, such as civil or grand jury proceedings, the Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State's case where a Fourth Amendment violation has been substantial and deliberate. See *Brewer* v. *Williams,* 430 U. S. 387, 422 (1977) (BURGER, C. J., dissenting); *Stone* v. *Powell,* 428 U. S., at 538 (WHITE, J., dissenting). We see no principled basis for distinguishing between the question of the sufficiency of an affidavit, which also is subject to a post-search reexamination, and the question of its integrity.

IV

In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless

disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.[8] On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Because of Delaware's absolute rule, its courts did not have occasion to consider the proffer put forward by petitioner Franks. Since the framing of suitable rules to govern proffers is a matter properly left to the States, we decline ourselves to pass on petitioner's proffer. The judgment of the Supreme Court of Delaware is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT

J. P. COURT #7

IN THE MATTER OF: Jerome Franks, B/M, DOB: 10/9/54 and 222 S. Governors Ave., Apt. #3, Dover, Delaware. A two room apartment located on the South side, second floor, of a white block building on the west side of S. Governors Avenue, Between Loockerman Street and North Street, in the City of Dover. The ground floor of this building houses Wayman's Barber Shop.

STATE OF DELAWARE }
COUNTY OF KENT } ss:

Be it remembered that on this 9th day of March A. D.

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[8] Petitioner conceded that if what is left is sufficient to sustain probable cause, the inaccuracies are irrelevant. Tr. of Oral Arg. 3, 13. Petitioner also conceded that if the warrant affiant had no reason to believe the information was false, there was no violation of the Fourth Amendment. *Id.*, at 16–17.

1976 before me John Green, personally appeared Det. Ronald R. Brooks and Det. Larry Gray of the Dover Police Department who being by me duly sworn depose and say:

That they have reason to believe and do believe that in the 222 S. Governors Avenue, Apartment #3, Dover, Delaware. A two room apartment located on the south side second floor of a white block building on the west side of S. Governors Avenue between Loockerman Street and North Street in the City of Dover. The ground floor of this building houses Wayman's Barber Shop the occupant of which is Jerome Franks there has been and/or there is now located and/or concealed certain property in said house, place, conveyance and/or on the person or persons of the occupants thereof, consisting of property, papers, articles, or things which are the instruments of criminal offense, and/or obtained in the commission of a crime, and/or designated to be used in the commission of a crime, and not reasonably calculated to be used for any other purpose and/or the possession of which is unlawful, papers, articles, or things which are of an evidentiary nature pertaining to the commission of a crime or crimes specified therein and in particular, a white knit thermal undershirt; a brown ¾ length leather jacket with a tie-belt; a pair of black mens pants; a dark colored knit hat; a long thin bladed knife or other instruments or items relating to the crime.

Articles, or things were, are, or will be possessed and/or used in violation of Title 11, Sub-Chapter D, Section 763, Delaware Code in that [see attached probable-cause page].

Wherefore, affiants pray that a search warrant may be issued authorizing a search of the aforesaid 222 S. Governors Avenue, Apartment #3, Dover, Delaware. A two room apartment located on the south side second floor of a white block building on the west side of S. Governors Avenue

between Loockerman St. and North Street, in the City of Dover in the manner provided by law.

/s/ Det. Ronald R. Brooks
Affiant

/s/ Det. Larry D. Gray
Affiant

SWORN to (or affirmed) and subscribed before me this 9th day of March A. D. 1976.

/s/ John [illegible] Green
Judge Ct 7

The facts tending to establish probable cause for the issuance of this search warrant are:

1. On Saturday, 2/28/76, Brenda L. B. ——, W/F/15, reported to the Dover Police Department that she had been kidnapped and raped.
2. An investigation of this complaint was conducted by Det. Boyce Failing of the Dover Police Department.
3. Investigation of the aforementioned complaint revealed that Brenda B. ——, while under the influence of drugs, was taken to 222 S. Governors Avenue, Apartment 3, Dover, Delaware.
4. Investigation of the aforementioned complaint revealed that 222 S. Governors Avenue, Apartment #3, Dover, Delaware, is the residence of Jerome Franks, B/M DOB: 10/9/54.
5. Investigation of the aforementioned complaint revealed that on Saturday, 2/2[8]/76, Jerome Franks did have sexual contact with Brenda B. ——— without her consent.
6. On Thursday, 3/4/76 at the Dover Police Department, Brenda B. —— revealed to Det. Boyce Failing that Jerome Franks was the person who committed the Sexual Assault against her.
7. On Friday, 3/5/76, Jerome Franks was placed under

arrest by Cpl. Robert McClements of the Dover Police Department, and charged with Sexual Misconduct.

8. On 3/5/76 at Family Court in Dover, Delaware, Jerome Franks did, after being arrested on the charge of Sexual Misconduct, ma[k]e a statement to Cpl. Robert McClements, that he thought the charge was concerning Cynthia Bailey not Brenda B. ———.
9. On Friday, 3/5/76, Cynthia C. Bailey, W/F/21 of 132 North Street, Dover, Delaware, did report to Dover Police Department that she had been raped at her residence during the night.
10. Investigation conducted by your affiant on Friday, 3/5/76, revealed the perpetrator of the crime to be an unknown black male, approximately 5′7″, 150 lbs., dark complexion, wearing white thermal undershirt, black pants with a belt having a silver or gold buckle, a brown leather ¾ length coat with a tie belt in the front, and a dark knit cap pulled around the eyes.
11. Your affiant can state, that during the commission of this crime, Cynthia Bailey was forced at knife point and with the threat of death to engage in sexual intercourse with the perpetrator of the crime.
12. Your affiant can state that entry was gained to the residence of Cynthia Bailey through a window located on the east side of the residence.
13. Your affiant can state that the residence of Jerome Franks is within a very short distance and direct sight of the residence of Cynthia Bailey.
14. Your affiant can state that the description given by Cynthia Bailey of the unknown black male does coincide with the description of Jerome Franks.
15. On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people.

16. On Tuesday, 3/9/76, Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket.
17. On Tuesday, 3/9/76, Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat.
18. Your affiant can state that a check of official records reveals that in 1971 Jerome Franks was arrested for the crime of rape and subsequently convicted with Assault with intent to Rape.

APPENDIX B TO OPINION OF THE COURT

States permitting veracity challenges include:

Alabama: *McConnell* v. *State*, 48 Ala. App. 523, 526–528, 266 So. 2d 328, 330–333 (Crim. App.), cert. denied, 289 Ala. 746, 266 So. 2d 334 (1972).

Alaska: *Davenport* v. *State*, 515 P. 2d 377, 380 (1973).

Arizona: *State* v. *Payne*, 25 Ariz. App. 454, 456, 544 P. 2d 671, 673 (1976); cf. *State* v. *Pike*, 113 Ariz. 511, 513–514, 557 P. 2d 1068, 1070–1071 (1976) (en banc).

Colorado: *People* v. *Arnold*, 186 Colo. 372, 377–378, 527 P. 2d 806, 809 (1974) (en banc).

Iowa: *State* v. *Boyd*, 224 N. W. 2d 609, 616 (1974) (en banc).

Louisiana: *State* v. *Melson*, 284 So. 2d 873, 874–875 (1973), limiting *State* v. *Anselmo*, 260 La. 306, 313–322, 256 So. 2d 98, 101–104 (1971), cert. denied, 407 U. S. 911 (1972).

Massachusetts: *Commonwealth* v. *Reynolds*, 374 Mass. 142, 149–151, 370 N. E. 2d 1375, 1379–1380 (1977).

Minnesota: *State* v. *Luciow*, 308 Minn. 6, 10–13, 240 N. W. 2d 833, 837–838 (1976) (en banc).

Montana: *State* v. *Nanoff*, 160 Mont. 344, 348, 502 P. 2d 1138, 1140 (1972), *sub silentio* overruling *State* v. *English*, 71 Mont. 343, 350, 229 P. 727, 729 (1924).

New Hampshire: *State* v. *Spero*, 177 N. H. 199, 204–205, 371 A. 2d 1155, 1158 (1977) (based on State Constitution).

Pennsylvania: *Commonwealth* v. *Hall*, 451 Pa. 201, 204, 302 A. 2d 342, 344 (1973).

South Carolina: *State* v. *Sachs*, 264 S. C. 541, 556, 216 S. E. 2d 501, 509 (1975).

Vermont: *State* v. *Dupaw*, 134 Vt. 451, 452–453, 365 A. 2d 967, 968 (1976).

Washington: *State* v. *Lehman*, 8 Wash. App. 408, 414, 506 P. 2d 1316, 1321 (1973) (Div. 3); *State* v. *Goodlow*, 11 Wash. App. 533, 535, 523 P. 2d 1204, 1206 (1974) (Div. 1); cf. *State* v. *Manly*, 85 Wash. 2d 120, 125, 530 P. 2d 306, 309 (en banc), cert. denied, 423 U. S. 855 (1975).

Five States, whose practice is dictated or may be dictated by statute, also permit veracity challenges:

California: *Theodor* v. *Superior Court*, 8 Cal. 3d 77, 90, 100–101, 501 P. 2d 234, 243, 251 (1972) (en banc); see Cal. Penal Code Ann. §§ 1538.5, 1539, 1540 (West 1970 and Supp. 1978).

New York: *People* v. *Alfinito*, 16 N. Y. 2d 181, 185–186, 211 N. E. 2d 644, 646 (1965); *People* v. *Slaughter*, 37 N. Y. 2d 596, 600, 338 N. E. 2d 622, 624 (1975); see N. Y. Code Crim. Proc. §§ 813–c, 813–d, 813–e (McKinney

Supp. 1970–1971), superseded by N. Y. Crim. Proc. Law, Art. 710 (McKinney Supp. 1977–1978).

North Carolina: See N. C. Gen. Stat. § 15A–978 (1978).

Oregon: *State* v. *Wright*, 266 Ore. 163, 168–169, n. 3, 511 P. 2d 1223, 1225–1226, n. 3 (1973) (en banc); see Ore. Rev. Stat. § 133.693 (1977).

Utah: *State* v. *Bankhead*, 30 Utah 2d 135, 138, 514 P. 2d 800, 802 (1973); see Utah Code Ann. §§ 77–54–17, 77–54–18 (1953).

Two other States are more doubtful, but seem to allow veracity challenges:

Michigan: *People* v. *Burt*, 236 Mich. 62, 74, 210 N. W. 97, 101 (1926).

New Mexico: *State* v. *Baca*, 84 N. M. 513, 515, 505 P. 2d 856, 858 (1973) (dictum).

The following States have disposed of particular veracity challenges on the ground the affidavits were in fact not false, or that any misstatements were immaterial or unintentional or were not by the affiant himself:

Florida: *McDougall* v. *State*, 316 So. 2d 624, 625 (Dist. Ct. App. 1975).

Georgia: *Williams* v. *State*, 232 Ga. 213, 213–214, 205 S. E. 2d 859, 860 (1974); *Lee* v. *State*, 239 Ga. 769, 773–774, 238 S. E. 2d 852, 856 (1977); *Birge* v. *State*, 143 Ga. App. 632, 633, 239 S. E. 2d 395, 397 (1977).

Indiana: *Moore* v. *State*, 159 Ind. App. 381, 385–386, 307 N. E. 2d 92, 94–95 (1974); *Grzesiowski* v. *State*, 168 Ind. App. 318, 328, 343 N. E. 2d 305, 312 (1976); but see *Seager* v. *State*, 200 Ind. 579, 582, 164 N. E. 274, 275 (1928).

Ohio: *State* v. *Dodson*, 43 Ohio App. 2d 31, 35–36, 332 N. E. 2d 371, 374–375 (1974).

Wisconsin: *Scott* v. *State*, 73 Wis. 2d 504, 511–512, 243 N. W. 2d 215, 219 (1976).

Cf. Maine: *State* v. *Koucoules*, 343 A. 2d 860, 865 n. 3 (1974).

Eleven States flatly prohibit veracity challenges:

Arkansas: *Liberto* v. *State*, 248 Ark. 350, 356–357, 451 S. W. 2d 464, 468 (1970) (alternative holding); cf. *Powell* v. *State*, 260 Ark. 381, 383, 540 S. W. 2d 1, 2 (1976).

Connecticut: *State* v. *Williams*, 169 Conn. 322, 327–329, 363 A. 2d 72, 76–77 (1975).

Illinois: *People* v. *Bak*, 45 Ill. 2d 140, 144–146, 258 N. E. 2d 341, 343–344, cert. denied, 400 U. S. 882 (1970); *People* v. *Stansberry*, 47 Ill. 2d 541, 544, 268 N. E. 2d 431, 433, cert. denied, 404 U. S. 873 (1971).

Kansas: *State* v. *Lamb*, 209 Kan. 453, 467–468, 497 P. 2d 275, 287 (1972); *State* v. *Sanders*, 222 Kan. 189, 194–196, 563 P. 2d 461, 466–467 (alternative holding), cert. denied, 434 U. S. 833 (1977).

Kentucky: *Caslin* v. *Commonwealth*, 491 S. W. 2d 832, 834 (1973).

Maryland: *Smith* v. *State*, 191 Md. 329, 334–336, 62 A. 2d 287, 289–290 (1948), cert. denied, 336 U. S. 925 (1949); *Tucker* v. *State*, 244 Md. 488, 499–500, 224 A. 2d 111, 117–118 (1966), cert. denied, 386 U. S. 1024 (1967); *Dawson* v. *State*, 11 Md. App. 694, 713–715, 276 A. 2d 680, 690–691 (1971).

Mississippi: *Wood* v. *State*, 322 So. 2d 462, 465 (1975).

New Jersey: *State* v. *Petillo*, 61 N. J. 165, 173–179, 293 A. 2d 649, 653–656 (1972), cert. denied, 410 U. S. 945 (1973); but see 61 N. J., at 178 n. 1, 293 A. 2d, at 656 n. 1.

Oklahoma: *Brown* v. *State*, 565 P. 2d 697 (Crim. App. 1977), overruling *McCaskey* v. *State*, 534 P. 2d 1309, 1311–1312 (Crim. App. 1975), and *Henderson* v. *State*, 490 P. 2d 786, 789 (Crim. App. 1971), and reaffirming *Gaddis* v. *State*, 447 P. 2d 42 (Crim. App. 1968).

Tennessee: *Owens* v. *State*, 217 Tenn. 544, 553, 399 S. W. 2d 507, 511 (1965); *Poole* v. *State*, 4 Tenn. Crim. 41, 53–54, 467 S. W. 2d 826, 832, cert. denied, *ibid.* (1971).

Texas: *Phenix* v. *State*, 488 S. W. 2d 759, 765 (Crim. App. 1972); *Oubre* v. *State*, 542 S. W. 2d 875, 877 (Crim. App. 1976).

Two States have prohibited challenges that were directed seemingly against the conclusory nature of the affidavits, rather than their veracity.

Missouri: *State* v. *Brugioni*, 320 Mo. 202, 206, 7 S. W. 2d 262, 263 (1928).

Rhode Island: *State* v. *Seymour*, 46 R. I. 257, 260, 126 A. 755, 756 (1924), partially overruled, *State* v. *LeBlanc*, 100 R. I. 523, 528–529, 217 A. 2d 471, 474 (1966); but see *State* v. *Cofone*, 112 R. I. 760, 766–767, 315 A. 2d 752, 755–756 (1974).

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's opinion in this case carefully identifies the factors which militate against the result which it reaches, and emphasizes their weight in attempting to limit the cir-

cumstances under which an affidavit supporting a search warrant may be impeached. I am not ultimately persuaded, however, that the Court is correct as a matter of constitutional law that the impeachment of such an affidavit must be permitted under the circumstances described by the Court, and I am thoroughly persuaded that the barriers which the Court believes that it is erecting against misuse of the impeachment process are frail indeed.

I

The Court's reliance on *Johnson* v. *United States,* 333 U. S. 10 (1948), for the proposition that a determination by a neutral magistrate is a prerequisite to the sufficiency of an application for a warrant is obviously correct. In that case the Court said:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.,* at 13–14.

The notion that there may be incorrect or even deliberately falsified information presented to a magistrate in the course of an effort to obtain a search warrant does not render the proceeding before a magistrate any different from any other factfinding procedure known to the law. The Court here says that "it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." *Ante,* at 165. I do not believe that this flat statement survives careful analysis.

If the function of the warrant requirement is to obtain the determination of a neutral magistrate as to whether sufficient

grounds have been urged to support the issuance of a warrant, that function is fulfilled at the time the magistrate concludes that the requirement has been met. Like any other determination of a magistrate, of a court, or of countless other fact-finding tribunals, the decision may be incorrect as a matter of law. Even if correct, some inaccurate or falsified information may have gone into the making of the determination. But unless we are to exalt as the *ne plus ultra* of our system of criminal justice the absolute correctness of every factual determination made along the tortuous route from the filing of the complaint or the issuance of an indictment to the final determination that a judgment of conviction was properly obtained, we shall lose perspective as to the purposes of the system as well as of the warrant requirement of the Fourth and Fourteenth Amendments. Much of what Mr. Justice Harlan said in his separate opinion in *Mackey* v. *United States*, 401 U. S. 667 (1971), with respect to collateral relief from a criminal conviction is likewise applicable to collateral impeachment of a search warrant:

> "At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

> "A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. [Citation omitted.] This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Id.*, at 690–691.

I am quite confident that if our system of justice were not administered by judges who were once lawyers, it might well be less satisfactory than it now is. But I am equally confident that one improvement which would manifest itself as a result of such a change would be a willingness, reflected in almost all callings in our society except lawyers, to refrain from constant relitigation, whether in the form of collateral attack, appeal, retrial, or whatever, of issues that have originally been decided by a competent authority.

It would be extraordinarily troubling in any system of criminal justice if a verdict or finding of guilt, later conclusively shown to be based on false testimony, were to result in the incarceration of the accused notwithstanding this fact. But the Court's reference to the "unthinkable imposition" of not allowing the impeachment of an affiant's testimony in support

of a search warrant is a horse of quite another color. Particularly in view of the many hurdles which the prosecution must surmount to ultimately obtain and retain a finding of guilt in the light of the many constitutional safeguards which surround a criminal accused, it is essential to understand the role of a search warrant in the process which may lead to the conviction of such an accused. The warrant issued on impeachable testimony has, by hypothesis, turned up incriminating and admissible evidence to be considered by the jury at the trial. The fact that it was obtained by reason of an impeachable warrant bears not at all on the innocence or guilt of the accused. The only conceivable harm done by such evidence is to the accused's rights under the Fourth and Fourteenth Amendments, which have nothing to do with his guilt or innocence of the crime with which he is charged.

Given the definitive exposition of the warrant requirement quoted above from *Johnson* v. *United States,* 333 U. S., at 13–14, it seems to me it would be quite reasonable for this Court, consistently with the Fourth and Fourteenth Amendments, to adopt any one of three positions with respect to the impeachability of a search warrant which had been in fact issued by a neutral magistrate who satisfied the requirements of *Shadwick* v. *Tampa,* 407 U. S. 345 (1972).

First, it could decide that the warrant requirement was satisfied when such a magistrate had been persuaded, and allow no further collateral attack on the warrant. In *Aguilar* v. *Texas,* 378 U. S. 108 (1964), the Court in reliance on *Giordenello* v. *United States,* 357 U. S. 480 (1958), a case concededly decided pursuant to Fed. Rule Crim. Proc. 4, nonetheless held that the determination by a magistrate that the affidavit submitted to him made out "probable cause" for purposes of the Fourth and Fourteenth Amendments was subject to later judicial review as to the sufficiency of the affidavit. This rule was later reaffirmed in *Spinelli* v. *United States,* 393 U. S. 410 (1969). The Court has thus for more than a decade

rejected the first possible stopping place in judicial re-examination of affidavits in support of warrants, and held that the legal determination as to probable cause was subject to collateral attack. While this conclusion does not seem to me to flow inexorably from the Fourth Amendment, I think that it makes a good deal of sense in light of the fact that a magistrate need not be a trained lawyer, see *Shadwick, supra,* and therefore may not be versed in the latest nuances of what is or what is not "probable cause" for purposes of the Fourth Amendment.

But to allow collateral examination of an affidavit in support of a warrant on a legal ground such as that is quite different from the rejection of the second possible stopping place as the Court does today. Magistrates need not be lawyers, but lawyers have no monopoly on determining whether or not an affiant who appears before them is or is not telling the truth. Indeed, a magistrate whose time may be principally spent in conducting preliminary hearings and trying petty offenses may have every bit as good a feel for the veracity of a particular witness as a judge of a court of general jurisdiction.

True, a warrant is issued *ex parte,* without an opportunity for the person whose effects are to be seized to impeach the testimony of the affiant. The proceeding leading to the issuance of a warrant is, therefore, obviously less reliable and less likely to be a searching inquiry into the truth of the affiant's statements than is a full-dress adversary proceeding. But it is at this point that I part company with the Court in its underlying assumption that somehow a full-dress adversary proceeding will virtually guarantee a truthful answer to the question of whether or not the affiant seeking the warrant falsified his testimony. A full-dress adversary proceeding is undoubtedly a better vehicle than an *ex parte* proceeding for arriving at the truth of any particular inquiry, but it is scarcely a guarantee of truth. Mr. Justice Jackson in his

opinion concurring in the result in *Brown* v. *Allen*, 344 U. S. 443 (1953), observed with respect to purely legal issues decided by this Court:

> "However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Id.*, at 540.

The same is surely true of a judge's review of the factual determinations of a magistrate; a larger percentage of the judge's findings as to the truth of an affiant's statement may be objectively correct than the percentage of the magistrate's determinations which are, but neither one is going to be 100 percent. Since once the warrant is issued and the search is made, the privacy interest protected by the Fourth and Fourteenth Amendments is breached, a subsequent determination that it was wrongfully breached cannot possibly restore the privacy interest. See *United States* v. *Calandra*, 414 U. S. 338 (1974). Since the evidence obtained pursuant to the warrant is by hypothesis relevant and admissible on the issue of guilt, the only purpose served by suppression of such evidence is deterrence of falsified testimony on the part of affiant in the future. Without attempting to summarize the many cases in which this Court has discussed the balance to be struck in such situations, see *United States* v. *Peltier*, 422 U. S. 531 (1975), I simply do not think the game is worth the candle in this situation.

As the Court's opinion points out, the other jurisdictions which have considered this question are divided, although a majority of them favor the result reached by the Court today. The signed articles and student law review notes which the Court refers to in its opinion are not there, I trust, to be considered *en bloc* or by some process of counting without weighing. Presumably, to the extent that their reasoning

commends itself to the courts which are committed to decide these questions, that reasoning will find its way into the opinions of those courts; to the extent that the reasoning does not so commend itself, the piece containing the reasoning does not weigh in the scales of decision simply because it appeared in a periodical devoted to the discussion of legal questions.

II

The Court has commendably, in my opinion, surrounded the right to impeach the affidavit relied upon to support the issuance of a warrant with numerous limitations. My fear, and I do not think it an unjustified one, is that these limitations will quickly be subverted in actual practice. The Court states:

> "Nor, if a sensible threshold showing is required and sensible substantive requirements for suppression are maintained, need there be any new large-scale commitment of judicial resources; many claims will wash out at an early stage, and the more substantial ones in any event would require judicial resources for vindication if the suggested alternative sanctions were truly to be effective. The requirement of a substantial preliminary showing should suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction." *Ante*, at 170.

I greatly fear that this generalized language will afford insufficient protection against the natural tendency of ingenious lawyers charged with representing their client's cause to ceaselessly undermine the limitations which the Court has placed on impeachment of the affidavit offered in support of a search warrant. I am sure that the Court is sincere in its expressed hope that the doctrine which it adopts will not lead to "any new large-scale commitment of judicial resources," but in the end I am led once more to echo the

observation contained in another opinion of Mr. Justice Jackson:

> "The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'" *Everson* v. *Board of Education*, 330 U. S. 1, 19 (1947) (dissenting opinion).

Since I would not "consent" even to the extent that the Court does in its opinion, I dissent from that opinion and would affirm the judgment of the Supreme Court of Delaware.

McADAMS, EXECUTOR, ET AL. *v.* McSURELY ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1621. Argued March 1, 1978—Decided June 26, 1978

Certiorari dismissed. Reported below: 180 U. S. App. D. C. 101, 553 F. 2d 1277.

Deputy Solicitor General Easterbrook argued the cause for petitioners. With him on the briefs were *Acting Solicitor General Friedman* and *Assistant Attorney General Babcock.*

Morton Stavis argued the cause for respondents. With him on the brief were *Doris Peterson, Nancy Stearns, Dan Jack Combs,* and *Charles N. Mason, Jr.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

BERRY ET AL. *v.* DOLES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided June 26, 1978

In 1968 the Georgia statute covering the voting procedures for election of the three members of the Peach County Board of Commissioners of Roads and Revenues was amended so that instead of all three posts being filled at four-year intervals, the single at-large member was to be elected to a two-year term in 1968 and to a four-year term at subsequent elections. Shortly before the 1976 primary election for two seats on the Board not including the at-large post, appellants brought an action to enforce § 5 of the Voting Rights Act of 1965, which requires changes in voting procedures to be submitted for approval either to the United States District Court for the District of Columbia or to the Attorney General. After the scheduled 1976 primary and general elections, a three-judge District Court enjoined further enforcement of the 1968 amendment until appellees effected compliance with § 5, but refused to set aside the 1976 elections, noting "an apparent lack of any discriminatory purpose or effect surrounding the use of the law in the 1976 elections." *Held:* The District Court erred in denying affirmative relief as to the 1976 election, and should enter an order allowing appellees 30 days within which to apply for federal approval of the 1968 voting change under § 5.

Affirmed in part and reversed in part.

PER CURIAM.

This appeal presents a challenge to the scope of the remedy allowed by a three-judge District Court for the Middle District of Georgia for failure of appellees to comply with the approval provisions of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c (1970 ed., Supp. V).

In 1968, the State of Georgia enacted a statute intended to stagger the terms of the three members of the Peach County Board of Commissioners of Roads and Revenues. The then-existing statute, adopted in 1964, provided that all three posts were to be filled at four-year intervals. By operation of the

1968 amendment, the single at-large member was to be elected to a two-year term in 1968 and to a four-year term at subsequent general elections. Appellees concede, and the three-judge court found, that the 1968 statute constituted a change in voting procedures subject to the provisions of § 5 and that the change had been implemented without first having been submitted for approval either to the United States District Court for the District of Columbia or to the Attorney General as required by § 5.

Four days prior to the August 10, 1976, primary election for the two seats on the Board not including the at-large post, appellants filed this action to enforce the requirements of § 5. Appellants' requests for declaratory and injunctive relief were not acted upon until after the scheduled 1976 primary and general elections.

On February 28, 1977, the three-judge court, without a hearing, enjoined further enforcement of the 1968 statute until such time as appellees effected compliance with § 5. However, the District Court refused appellants' request to set aside the 1976 elections, noting "the rather technical changes made in the county's election law by the 1968 amendment and, more important, the apparent lack of any discriminatory purpose or effect surrounding the use of the law in the 1976 elections." In expressly limiting its order to prospective relief, the District Court also relied on our decision in *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969).

On April 26, 1977, the three-judge court denied appellants' motion for reconsideration.

In this Court, appellants take the position that the relief awarded in this case is wholly inadequate in failing to remedy the existing § 5 violation. Appellants assert that by refusing either to set aside the 1976 election or to order that all three Board members be elected in 1978, the District Court, at least until the 1980 election, leaves undisturbed the effects of the § 5 violation, thereby acknowledging that, at least for a time, local officials may successfully disregard § 5 requirements.

Appellees urge us to affirm the District Court judgment on grounds that the 1976 election involved the two Board posts which were not mentioned in the 1968 statute. Accordingly, appellees argue, election to these posts is not subject to § 5. However, even assuming that the District Court had the power to effect one of the alternative remedies suggested by appellants, appellees believe that the court below was correct in refusing to do so.

At our request, the United States, as *amicus curiae*, has filed a brief in this case. The Government takes the view, espoused by appellants, that the 1976 election was affected by the voting change prescribed in the 1968 statute and that the District Court's failure to require prompt compliance with § 5 permits the violation to continue. It is the submission of the United States that the question whether the staggering of Board terms provided for by state statute in this case necessarily has a racially discriminatory effect should properly be promptly submitted to either the District Court for the District of Columbia or to the Attorney General in conformity with the approval procedures set forth in § 5.

In *Perkins* v. *Matthews*, 400 U. S. 379 (1971), decided after *Allen*, *supra*, we had occasion to address the remedy issue which now confronts us. We indicated in that case that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." 400 U. S., at 396–397. The circumstances present here make such a course appropriate.

In this case, appellees' undisputed obligation to submit the 1968 voting law change to a forum designated by Congress has not been discharged. We conclude that the requirement of federal scrutiny imposed by § 5 should be satisfied by appellees without further delay. Accordingly, we adopt the suggestion of the United States that the District Court should enter an

order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5. If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for simultaneous election of all members of the Board at the 1978 general election.

The judgment of the District Court is affirmed insofar as it holds that appellees have violated the approval provisions of § 5 of the Voting Rights Act; the judgment is reversed insofar as it denies affirmative relief, and the case is remanded to the District Court with instructions to issue an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5, and for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the Court's opinion. The Court is surely correct that the District Court committed reversible error by not, at the very least, ordering the Peach County officials to seek preclearance of the voting change enforced in the 1976 election and affording appellants the opportunity, if prior approval is not granted, to seek an order that would cut short the terms of the two Commissioners elected in 1976 and require a new election under the pre-1968 law. The District Court manifestly erred in refusing to order such relief on the basis of its conclusion that the change was "rather technical" with no "apparent discriminatory purpose or effect." Nothing could be clearer than that a district court—other, of course, than the District Court for the District of Columbia—has no jurisdiction to assess the purpose or effect of any voting change. See, *e. g.*, *United States* v. *Board of Supervisors*, 429 U. S. 642 (1977); *Perkins* v. *Matthews*, 400 U. S. 379, 385 (1971).

Although the Court does not reach this issue, I think it clear

that, if the Peach County officials do not hereafter obtain federal preclearance for the 1968 change, the District Court must order a new election for all three posts at the earliest feasible time—that here being the regularly scheduled 1978 election. For if a designated federal entity cannot hereafter approve the 1968 voting change as racially neutral, it follows necessarily that there is a substantial probability that the 1976 election itself perpetrated racial discrimination in voting. To permit the results of the 1976 election to stand in the face of such a determination would be to do precisely what § 5 was designed to forbid: allow the burdens of litigation and delay to operate in favor of the perpetrators and against the victims of possibly racially discriminatory practices. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 335 (1966).

However, while I, therefore, agree that the District Court committed reversible error, I am also of the view that, in the circumstances of this case, a strong argument can be made that, whether or not preclearance can be obtained, the only sufficient remedy is to set aside the 1976 election and order a new election under the pre-1968 law. Here, the Peach County officials could not have reasonably believed at the time of the 1976 election that the 1968 voting change could continue to be validly enforced without obtaining prior federal approval; thus the situation is quite different from that present in cases like *Perkins* v. *Matthews*, *supra*, where the scope of the § 5 duty had been unsettled at the time of the election that was under attack.

If, in cases like the present one, the remedy of ordering a new election is not to be required in all cases, the political units covered by § 5 may have a positive incentive flagrantly to disregard their clear obligations and not to seek preclearance of proposed voting changes. For covered jurisdictions will then know that a § 5 violation, if a suit is brought, can only result in their being denied the right to continue to enforce those voting changes that could not have received federal approval in the

first place. As to all other voting changes, the sole effect of a suit for noncompliance with the approval provisions will be the limited sanction of requiring the political unit to obtain the federal approval which it should have received before any change was instituted.

The legislative background of § 5 strongly suggests to me that Congress expressly intended to preclude such a state of affairs. Section 5, of course, was intended to prevent those States which had a history of racial discrimination in voting from adhering to their long-established practices of continually contriving new laws to deprive blacks of any newly won voting rights. Congress sought to place the burden of inertia and litigation delay on the perpetrators of the discrimination by requiring affected States voluntarily to submit any new law affecting voting for federal approval before it became effective. The remedial theory the Court embraces today may retard, not further, the objective of having polities voluntarily comply with § 5, for a possible consequence may well be that a very large share of the burden of implementing federal policy will be placed on public and private enforcement. We ought to have the benefit of full briefing and oral argument to help indicate whether this will be the case.

I do not regard *Perkins* v. *Matthews, supra,* as necessarily supporting the Court's decision. While it is true that the Court there stated that there might be circumstances in which it would be appropriate to order a new election only if federal approval for the voting change were not procured within a specified time period, 400 U. S., at 396, the context of this statement clearly suggests that it is intended to apply only to cases in which it had not been reasonably clear at the time of the election that the change was covered by § 5. *Ibid.**

*I recognize that the case involves a voting change first implemented in 1968. This fact does not, however, necessarily support the Court's decision. Since the duty to comply with § 5 is a continuing one and applied to Peach County's enforcement of the 1968 change in the 1976 election,

However, since there is no disposition on the part of my colleagues to note probable jurisdiction and set the case down for oral argument, I join the Court's opinion.

MR. JUSTICE POWELL, concurring in the judgment.

Although I believe that the wiser course would be simply to affirm the judgment below, I go along reluctantly with the Court's resolution of this case rather than bring it here for argument. I am willing to do this only because I consider it most unlikely that the Attorney General could find any reasoned basis for denying approval of the change at issue in this case. Thus, it is improbable that the court below ever will have to pass on the request to cut short the terms of the two Commissioners elected in 1976 which the Court allows appellants to "renew" if the change is not approved. *Ante,* at 193. I write to emphasize my view that the three-judge court cannot be faulted for its common-sense handling of this case. I do not understand the Court to disagree with this view.

I

The facts and procedural posture of this case deserve a fuller treatment than the Court gives them. Under a state law enacted in 1964, the Board of Commissioners of Roads and Revenues for Peach County, Ga., is composed of three members, assigned to numbered posts. 1964 Ga. Laws No. 800, § 1, p. 2627. Posts 1 and 2 are filled by residents of designated districts, and Post 3 is elected at large. Until 1968, all three posts were elected simultaneously for four-year terms. In 1968, the Georgia Legislature enacted a statute providing for a partial staggering of the Commissioners' terms. 1968 Ga. Laws No. 800, § 2A, p. 2473. Under the statute, Post 3, the at-large seat, was to be elected to a two-year term in 1968, and thereafter to four-year terms. No change was made in

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a strong argument can be made that the only relevant consideration should be that the § 5 duty was clear in 1976.

the terms of the other two Commissioners. The result is that the election for Post 3 no longer is held at the same time as the election for the other two posts.[1]

Elections were held under the amendment in 1968, 1970, 1972, and 1974 without challenge. It was only on August 6, 1976—four days before the 1976 primary election—that appellants filed this lawsuit seeking to enjoin that election and the general election on the ground that the amendment had not received the imprimatur of the Attorney General or the District Court for the District of Columbia as required by § 5 of the Voting Rights Act of 1965. A single judge of the District Court, acting promptly, ruled on appellants' motion for a preliminary injunction before the primary election was held. That judge, "seriously question[ing]" whether the change even was covered by § 5, and apparently in view of the tardiness of the suit—which to this day has not been explained—sensibly refused to enjoin the election. App. to Jurisdictional Statement 7a.

After the 1976 primary and general elections for Posts 1 and 2 had been held, a three-judge District Court was convened. That court concluded that the 1968 amendment was subject to the preclearance requirements of § 5 after all, and it enjoined enforcement of the 1968 amendment until those requirements had been met. "Given the rather technical changes made in the county's election law by the 1968 amendment and, more important, the apparent lack of any discriminatory purpose or effect surrounding the use of the law in the 1976 elections," however, the court denied appellants' request to set aside those elections. *Id.*, at 2a–3a, citing *Allen* v. *State*

[1] It should be noted that the amendment was enacted before this Court, by judicial interpretation, extended the coverage of the Voting Rights Act of 1965 in, *e. g.*, *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969), and *Perkins* v. *Matthews*, 400 U. S. 379 (1971). Thus, when the amendment was enacted, there was no reason to suspect that § 5 preclearance was required.

Board of Elections, 393 U. S. 544, 571–572 (1969).[2] The three-judge court thereupon "dissolve[d] itself and remand[ed] the case to the originating judge for such other and further proceedings consistent with this opinion as may be required." App. to Jurisdictional Statement 4a.

Appellants then filed a motion for reconsideration and modification of the three-judge court's order. In this motion appellants—for the first time—asked the three-judge court to order that all three posts stand for election in 1978 if the change was not approved by then, thus cutting short the terms of the two Commissioners elected in 1976. See Jurisdictional Statement 7 n. 1, 15–16; Brief for United States as *Amicus Curiae* 4. The three-judge court refused to consider this belated request, stating: "The problem of relief is a question for a single-judge court." App. to Jurisdictional Statement 5a. Appellants, however, did not accept this clear invitation to press their request before a single-judge court.

Instead, they brought the instant appeal, urging the Court either to set aside the 1976 elections, or to cut short the terms of the two Commissioners elected in 1976 by declaring all three posts open in 1978. The United States as *amicus curiae* does not support appellants' request that the 1976 election be set aside. Neither does it support appellants' request that the Court declare all three posts open in 1978. Instead, it seeks relief that appellants never have requested, either in the court below or in this Court. It asks the Court to enter an order directing the District Court to give appellees 30 days within which to seek § 5 preclearance. If preclearance is not sought or if the change is not approved, the United States then argues that the District Court should be directed to allow appellants "to renew their request for election of all three members at

[2] In giving only prospective effect to its decision in *Allen*, the Court took into account the fact that "the discriminatory purpose or effect of [the challenged] statutes, if any, has not been determined by any court." 393 U. S., at 572.

the same time." Brief for United States as *Amicus Curiae* 8. The United States, like the Court today, see n. 7, *infra*, carefully takes no position on whether the District Court should grant such further relief if this request is "renewed."

In my view, the Court would be fully justified in holding that the United States, which is not a party to this suit and did not participate in the court below, is barred from injecting a new issue into the case by requesting the Court to grant relief that appellants themselves never have sought. It would be equally justified in holding that appellants are barred from asking the Court to declare all three posts open in 1978 after the three-judge court declined to rule on this belated request and after appellants ignored that court's express invitation to press their request before a single-judge court. As a general rule, this Court does not and should not allow parties or *amici* to raise issues here that were not raised in or ruled upon by the lower courts. Neither should this Court encourage parties to bypass avenues of relief that are open to them in the lower courts. The facts that the case is a Voting Rights Act case, and that the *amicus* is the United States, provide no justification for departing from these salutary principles.

II

Since the Court has chosen, without explanation, to depart from these principles, I briefly address the question of relief that is presented. Appellees do not challenge the three-judge court's holding that § 5, as it has been expanded by judicial decision since enactment of the 1968 amendment at issue here, requires preclearance of that amendment. Nor do they challenge that court's entry of an injunction against enforcing the amendment in future elections until the change is approved. All they ask is that if the change is not approved, such a ruling should not be applied retroactively to abrogate the result of elections already held. In my view, there is much force to their plea.

This case is a classic example of how § 5, enacted to further

the exercise of an important constitutional right, has been judicially expanded to cover the most inconsequential change in any aspect of election procedure.[3] Given this expansion, when courts are called upon to decide whether to grant retroactive relief, they should distinguish the minor or technical change from the substantive change that is likely to result in discrimination. In refusing to set aside the 1976 election, the three-judge court, much to its credit, did just this. Significantly, the Court today does not disturb that judgment, despite appellants' prayer that it do so.[4]

It must be remembered that the Voting Rights Act imposes restrictions unique in the history of our country on a limited number of selected States.[5] The need to bring a measure of

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[3] In *Perkins* v. *Matthews, supra,* the Court held that "§ 5 requires prior submission of any changes in the location of polling places." 400 U. S., at 388. There are thousands of precincts and polling places in the jurisdictions covered by the Act, and changes in precinct boundary lines and polling places are necessary at frequent intervals to accommodate inevitable population shifts. But under the Court's interpretation of the Act, a locality that moves a single precinct line or polling place half a block is required first to obtain permission from Washington.

[4] The Court thus rejects MR. JUSTICE BRENNAN's suggestion, *ante,* at 193, that the District Court "erred in refusing to order [retroactive] relief on the basis of its conclusion that the change was 'rather technical' with no 'apparent discriminatory purpose or effect.'" See also *Allen* v. *State Board of Elections,* 393 U. S., at 572, quoted in n. 2, *supra; Perkins* v. *Matthews,* 400 U. S., at 396.

[5] As MR. JUSTICE STEVENS recently has written: "[The] so-called 'preclearance' requirement is one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a 'substantial departure . . . from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable." *United States* v. *Sheffield Board of Comm'rs,* 435 U. S. 110, 141 (1978) (dissenting opinion) (footnote omitted). Mr. Justice Harlan made much the same point by describing § 5 as "a revolutionary innovation in American government" which applies only to "a handful of States." *Allen* v. *State Board of Elections, supra,* at 585, 586 (concurring in part and dissenting in part).

common sense to its application is underscored further by the fact that state and local officials now are supplicants for the Attorney General's dispensation of approval under § 5 "at the rate of over 1,000 per year, and this rate is by no means indicative of the number of submissions involved if all covered States and political units fully complied with the preclearance requirement, as interpreted by the Attorney General." *United States* v. *Sheffield Board of Comm'rs*, 435 U. S. 110, 147 (1978) (STEVENS, J., dissenting) (footnote omitted). When a change is submitted, the Attorney General may block its implementation simply by stating, within 60 days, that he is unable to conclude that it does not have discriminatory purpose or effect. *Georgia* v. *United States*, 411 U. S. 526, 537 (1973). As a result, "the State may be left more or less at sea," *id.*, at 544 (WHITE, J., dissenting), unable to put into effect such routine and trivial changes as the movement of a polling place or a precinct boundary line.[6]

Thus, although I agree with the Court that the three-judge court did not err in refusing to set aside the 1976 elections, I remain dubious as to whether it would be any more proper for that court to order all three posts to stand for election in 1978 if the change is not approved. As the Court's order is framed, however, this question still is open in the District Court if the change is not approved.[7] Perhaps that court will be able to

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[6] One would like to assume that the Attorney General exercises this unprecedented power to veto state and local legislation personally and with the most thoughtful deliberation. But, as previously noted, applications for his dispensation flow to Washington at a rate of over 1,000 per year—almost 4 per business day. Even if the Attorney General had no duties other than those imposed upon him by § 5, one might doubt whether it would be possible for him to pass judgment, with care and sensitivity, upon each change in election laws or procedure submitted for his approval.

[7] The Court "adopt[s] the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5. . . . If

perceive some distinction that is not apparent to me between setting aside the 1976 elections—the denial of which relief this Court upholds—and achieving essentially the same result by cutting short the terms of the two Commissioners elected in 1976 by ordering all three posts to stand for election in 1978. Because I consider it unlikely that the three-judge court ever will have to face this question, I acquiesce in the disposition of the Court remanding "with instructions to issue an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5, and for further proceedings consistent with [the Court's] opinion." *Ante*, at 193.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEVENS joins, dissenting.

No party to this case has requested this Court to issue an order requiring or allowing appellees to apply for approval of the 1968 voting change under § 5 of the Voting Rights Act of 1965. The United States, when requested by this Court to express its views, made such a request. But the United States is only an *amicus curiae* in this case, and it has no standing to request relief which has never been requested by the parties. The opinion of the Court goes not merely beyond the scope of any relief sought from the District Court, but also decides questions beyond those presented in the jurisdictional state-

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approval is denied, appellants are free to renew to the District Court their request for simultaneous election of all members of the Board at the 1978 general election." *Ante*, at 192–193.

It then remands the case "to the District Court with instructions to issue an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5, and for further proceedings consistent with this opinion." *Ante*, at 193. But the Court does *not* direct the District Court to grant any "renewed" request that appellants may make. All that it orders is that the District Court allow appellees 30 days within which to seek preclearance and allow appellants to "renew" their request for simultaneous elections in 1978 if the change is not approved.

ment of appellants. In so doing, of course, the opinion is contrary to our Rule 15, which provides: "Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court."

I would affirm the judgment of the District Court in its entirety.

SWISHER, STATE'S ATTORNEY FOR BALTIMORE CITY, ET AL. *v.* BRADY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 77–653. Argued March 29, 1978—Decided June 28, 1978

Appellee minors brought a class action under 42 U. S. C. § 1983 seeking, on the basis of the Double Jeopardy Clause of the Fifth Amendment as applied to the States by the Fourteenth, to prevent the State of Maryland from filing exceptions with the Juvenile Court to proposed nondelinquency findings made by masters of that court pursuant to a rule of procedure (Rule 911) permitting the State to file such exceptions but further providing that the Juvenile Court judge, who is empowered to accept, modify, or reject, the master's proposals, can act on the exceptions only on the basis of the record made before the master, except that he may receive additional evidence to which the parties do not object. The District Court held that a juvenile subjected to a hearing before the master is placed in jeopardy, even though the master has no power to enter a final order, and that the Juvenile Court judge's review placed the juvenile in jeopardy a second time, and accordingly enjoined the appellant state officials from taking exceptions to either a master's proposed finding of nondelinquency or his proposed disposition. *Held:* The Double Jeopardy Clause does not prohibit Maryland officials, acting in accordance with Rule 911, from taking exceptions to a master's proposed findings. *Breed* v. *Jones,* 421 U. S. 519, distinguished. Pp. 214–219.

(a) The State by filing such exceptions does not require an accused to stand trial a second time, but rather the State has created a system with Rule 911 in which an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge. P. 215.

(b) A Rule 911 proceeding does not provide the prosecution the forbidden "second crack" at the accused, since under the Rule the State presents its evidence once before the master, and the record is then closed unless the minor consents to the presentation of additional evidence before the judge. Pp. 215–216.

(c) Nor does Rule 911, on the alleged ground that it gives the State a chance to persuade two factfinders—the master and the judge—violate the Double Jeopardy Clause's prohibition against the prosecutor's

enhancing the risk that an innocent defendant may be convicted, since the Rule confers the role of factfinder and adjudicator only on the judge, who is empowered to accept, modify, or reject the master's proposals. P. 216.

(d) There is nothing in the record to indicate that the Rule 911 procedure unfairly subjects the defendant to the embarrassment, expense, and ordeal of a second trial proscribed in *Green* v. *United States*, 355 U. S. 184, since even if the juvenile participates and his attorney appears in the Juvenile Court proceeding (and it does not appear that this is the practice), the burdens are more akin to those resulting from a judge's permissible request for post-trial briefing or argument following a bench trial than to the "expense" of a full-blown second trial. Pp. 216–217.

(e) To the extent the Juvenile Court judge makes supplemental findings in a manner permitted by Rule 911—either *sua sponte*, or in response to the State's or juvenile's exceptions, and either on the record before the master or on a record supplemented by evidence to which the parties do not object—he does so without violating the Double Jeopardy Clause's constraints. *United States* v. *Jenkins*, 420 U. S. 358, distinguished; cf. *United States* v. *Scott*, 437 U. S. 82. Pp. 217–219.

436 F. Supp. 1361, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and POWELL, JJ., joined, *post*, p. 219.

George A. Nilson, Deputy Attorney General of Maryland, argued the cause for appellants. With him on the brief were *Francis B. Burch*, Attorney General, and *Clarence W. Sharp* and *Alexander L. Cummings*, Assistant Attorneys General.

Peter S. Smith, by appointment of the Court, 434 U. S. 1007, argued the cause for appellees. With him on the brief were *Adrienne E. Volenik*, *Phillip G. Dantes*, and *Bruce A. Gilmore*.*

**David C. Howard* filed a brief for the National Juvenile Law Center as *amicus curiae* urging affirmance.

Paul Halvonik, pro se, and *Laurance S. Smith* filed a brief for the State Public Defender of California as *amicus curiae*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is an appeal from a three-judge District Court for the District of Maryland. Nine minors, appellees here, brought an action under 42 U. S. C. § 1983, seeking a declaratory judgment and injunctive relief to prevent the State from filing exceptions with the Juvenile Court to proposed findings and recommendations made by masters of that court. The minors' claim was based on an alleged violation of the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. The District Court's jurisdiction was invoked under 28 U. S. C. §§ 1343, 2281, and 2284 (as then written); this Court's jurisdiction, under 28 U. S. C. § 1253.

I

In order to understand the present Maryland scheme for the use of masters in juvenile court proceedings, it is necessary to trace briefly the history both of antecedent schemes and of this and related litigation.

Prior to July 1975, the use of masters in Maryland juvenile proceedings was governed by Rule 908 (e), Maryland Rules of Procedure. It provided that a master "shall hear such cases as may be assigned to him by the court." The Rule further directed that, at the conclusion of the hearing, the master transmit the case file and his "findings and recommendations" to the Juvenile Court. If no party filed exceptions to these findings and recommendations, they were to be "promptly . . . confirmed, modified or remanded by the judge." If, however, a party filed exceptions—and in delinquency hearings, only the State had the authority to do so—then, after notice, the Juvenile Court judge would "hear the entire matter or such specific matters as set forth in the exceptions *de novo*." [1]

[1] Rule 908 (e) was the sole authority for the use of masters in juvenile causes. The practice was not treated in Maryland statutes.

In the city of Baltimore, after the State filed a petition alleging that a minor had committed a delinquent act,[2] the clerk of the Juvenile Court[3] generally would assign the case to one of seven masters.[4] In the ensuing unrecorded hearing, the State would call its witnesses and present its evidence in accordance with the rules of evidence applicable in criminal cases. The minor could offer evidence in defense. At the conclusion of the presentation of evidence, the master usually would announce his findings and contemplated recommendations. In a minority of those cases where the recommendations favored the minor's position, the State would file exceptions, whereupon the Juvenile Court judge would try the case *de novo*.[5]

In 1972, a Baltimore City Master concluded, after a hearing, that the State had failed to show beyond a reasonable doubt that a minor, William Anderson, had assaulted and robbed a woman. His recommendation to the Juvenile Court judge reflected that conclusion. The State filed exceptions. Anderson responded with a motion to dismiss the notice of exceptions, contending that Rule 908 (e), with its provision for a *de novo* hearing, violated the Double Jeopardy Clause. The Juvenile Court judge ruled that juvenile proceedings as such were not outside the scope of the Double Jeopardy Clause.

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[2] Maryland, like 39 other States, defines a delinquent act as one that, if committed by an adult, would violate a criminal statute. See statutes collected at McCarthy, Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale, 52 N. Y. U. L. Rev. 1093 n. 2 (1977).

[3] The official name of the court is Circuit Court of Baltimore City, Division for Juvenile Causes.

[4] In 1974, of 5,345 delinquency hearings conducted in the Juvenile Court, 5,098 were held before masters. The remaining 247 were assigned in the first instance to the judge.

[5] In 1974, the Juvenile Court judge conducted 80 *de novo*, or "exceptions," hearings in delinquency matters. All hearings before the judge were recorded.

He then held that the proceeding before him on the State's exceptions would violate Anderson's right not to be twice put in jeopardy and, on that basis, granted the motion to dismiss. The judge granted the same relief to similarly situated minors, including several who later initiated the present litigation.

The State appealed and the Court of Special Appeals reversed. *In re Anderson,* 20 Md. App. 31, 315 A. 2d 540 (1974). That court assumed, for purposes of its decision, that jeopardy attached at the commencement of the initial hearing before the master. It held, however:

> "[T]here is *no adjudication* by reason of the master's findings and recommendations. The proceedings before the master and his findings and recommendations are simply the first phase of the hearing which continues with the consideration by the juvenile judge. Whether the juvenile judge, in the absence of exceptions, accepts the master's findings or recommendations, modifies them or remands them, or whether, when exceptions are filed, he hears the matter himself de novo, there is merely a continuance of the hearing and the initial jeopardy. In other words, *the hearing,* and the jeopardy thereto attaching, terminate only upon a valid adjudication *by the juvenile judge,* not upon the findings and recommendations of the master." *Id.,* at 47, 315 A. 2d, at 549 (footnotes omitted; emphasis added).

On this basis, the court concluded that the *de novo* hearing was not a second exposure to jeopardy.

On appeal by the minors, the Court of Appeals affirmed, although on a rationale different from that of the intermediate appellate court. *In re Anderson,* 272 Md. 85, 321 A. 2d 516 (1974). It held that "a hearing before a master is not such a hearing as places a juvenile in jeopardy." Central to this holding was the court's conclusion that masters in Maryland serve only as ministerial assistants to judges; although author-

ized to hear evidence, report findings, and make recommendations to the judge, masters are entrusted with none of the judicial power of the State, including the *sine qua non* of judicial office—the power to enter a binding judgment.[6]

In November 1974, five months after the Court of Appeals' decision, nine juveniles sought federal habeas corpus relief, contending that by taking exceptions to masters' recommendations favorable to them the State was violating their rights under the Double Jeopardy Clause. These same nine minors also initiated a class action under 42 U. S. C. § 1983 in which they sought a declaratory judgment and injunctive relief against the future operation of Rule 908 (e). The sole constitutional basis for their complaint was, again, the Double Jeopardy Clause. A three-judge court was convened to hear this matter, and it is the judgment of that court we now review.

Before either the three-judge District Court or the single judge reviewing the habeas corpus petitions could act, the Maryland Legislature enacted legislation which, for the first time, provided a statutory basis for the use of masters in juvenile court proceedings. In doing so, it modified slightly the scheme previously operative under Rule 908 (e). The new legislation required that hearings before a master be recorded and that, at their conclusion, the master submit to the Juvenile Court judge written findings of fact, conclusions of law, and recommendations. Either party was authorized to file exceptions and could elect a hearing on the record or a *de novo* hearing before the judge. The legislature specified that the master's "proposals and recommendations . . . for juvenile causes do not constitute orders or final action of the court." Accordingly, the judge could, even in the absence of exceptions, reject a master's recommendations and conduct a *de*

[6] When the minors appealed here from this decision, we dismissed for want of a substantial federal question, *Epps* v. *Maryland*, 419 U. S. 809 (1974), and also denied certiorari, *Anderson* v. *Maryland*, 421 U. S. 1000 (1975).

novo hearing or, if the parties agreed, a hearing on the record. Md. Cts. & Jud. Proc. Code Ann. § 3–813 (Supp. 1977).

In June 1975, within two months of the enactment of § 3–813 and before its July 1, 1975, effective date, the single-judge United States District Court held that the Rule 908 (e) provision for a *de novo* hearing on the State's exceptions violated the Double Jeopardy Clause. *Aldridge* v. *Dean*, 395 F. Supp. 1161 (Md. 1975). In that court's view, a juvenile was placed in jeopardy as soon as the State offered evidence in the hearing before a master. The court also concluded that to subject a juvenile to a *de novo* hearing before the Juvenile Court judge was to place him in jeopardy a second time. Accordingly, it granted habeas corpus relief to the six petitioners already subjected by the State to a *de novo* hearing. The petitions of the remaining three, who had not yet been brought before the Juvenile Court judge, were dismissed without prejudice as being premature.

In response to both the enactment of § 3–813 and the decision in *Aldridge* v. *Dean, supra,* the Maryland Court of Appeals, in the exercise of its rulemaking power, promulgated a new rule, and the one currently in force, Rule 911, to govern the use of masters in juvenile proceedings.[7] Rule 911 differs from the statute in significant aspects. First, in order to emphasize the nonfinal nature of a master's conclusions, it stresses that all of his "findings, conclusions, recommendations or . . . orders" are only *proposed.* Second, the State no longer has power to secure a *de novo* hearing before the Juvenile Court judge after unfavorable proposals by the master. The State still may file exceptions, but the judge can act on them only on the basis of the record made before the master and "such additional [relevant] evidence . . . to which the

[7] At the time of its promulgation, the new Rule was numbered 910. As a result of recent nonsubstantive amendments and recodification, it received the 911 designation, by which it is referred to throughout this opinion.

parties raise no objection." [8] The judge retains his power to accept, reject, or modify the master's proposals, to remand to the master for further hearings, and to supplement the record for his own review with additional evidence to which the parties do not object.[9]

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[8] The juvenile, after filing exceptions, can still elect either a *de novo* hearing or a hearing on the record.

[9] Rule 911, in its entirety, provides:

"a. *Authority.*

"1. Detention or Shelter Care.

"A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

"2. Other Matters.

"A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

"b. *Report to the Court.*

"Within ten days following the conclusion of a disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 306 (Service of Pleadings and Other Papers).

"c. *Review by Court if Exceptions Filed.*

"Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).

"Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise

Thus, Rule 911 is a direct product of the desire of the State to continue using masters to meet the heavy burden of juvenile court caseloads while at the same time assuring that their use not violate the constitutional guarantee against double jeopardy. To this end, the Rule permits the presentation and recording of evidence in the absence of the only officer authorized by the state constitution, see *In re Anderson*, 272 Md., at 104–105, 321 A. 2d, at 526–527, and by statute, § 3–813, to serve as the factfinder and judge.

After the effective date of Rule 911, July 1, 1975, the plaintiffs in the § 1983 action amended their complaint to bring Rule 911 within its scope. They continued to challenge the state procedure, however, only on the basis of the Double Jeopardy Clause. Other juveniles intervened as the ongoing work of the juvenile court brought them within the definition of the proposed class. Their complaints in intervention likewise rested only on the Double Jeopardy Clause.

The three-judge District Court certified the proposed class under Fed. Rule Civ. Proc. 23 (b)(2) to consist of all juveniles involved in proceedings where the State had filed exceptions to a master's proposed findings of nondelinquency. That court then held that a juvenile subjected to a hearing before a master is placed in jeopardy, even though the master has no power to enter a final order. It also held that the

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no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

"d. *Review by Court in Absence of Exceptions.*

"In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearings, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. Action by the court under this section shall be taken within two days after the expiration of the time for filing exceptions."

Juvenile Court judge's review of the record constitutes a "second proceeding at which [the juvenile] must once again marshal whatever resources he can against the State's and at which the State is given a second opportunity to obtain a conviction." 436 F. Supp. 1361, 1369 (Md. 1977). Accordingly, the three-judge District Court enjoined the defendant state officials[10] from taking exceptions to either a master's proposed finding of nondelinquency or his proposed disposition.

We noted probable jurisdiction solely to determine whether the Double Jeopardy Clause prohibits state officials, acting in accordance with Rule 911, from taking exceptions to a master's proposed findings.[11] 434 U. S. 963 (1977).

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[10] Defendants, appellants here, are the State's Attorney for Baltimore City, the operations chief of the State's Attorney's Office for Baltimore City, the Chief State Attorney assigned to the Baltimore City Juvenile Court, and the Clerk of that court.

[11] The State did not contend, either in the District Court or here, that appellees' suit for injunctive relief should be dismissed under the abstention doctrine of *Younger* v *Harris*, 401 U. S. 37 (1971). In these circumstances, we are not inclined to examine the application of the doctrine *sua sponte*. See *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471, 477–480 (1977) ("If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system").

There is also a mootness question in this case. At the time of final argument before the District Court, Fields, the last in a series of intervening plaintiffs, was the only named plaintiff with a live controversy against the State. By that time, the State had either withdrawn its exceptions against the other named plaintiffs or completed the adjudicatory process by securing a ruling, one way or the other, from the Juvenile Court judge. After final argument, but before the District Court announced its decision, the State withdrew its exceptions to the master's proposals respecting Fields. Nevertheless, the District Court, at the outset of its decision, granted Fields' motion to intervene and certified the class. 436 F. Supp., at 1362.

We conclude that under the principles announced in *Sosna* v. *Iowa*, 419 U. S. 393 (1975), the State's action, with respect to the original named

II

The general principles governing this case are well established.

> "A State may not put a defendant in jeopardy twice for the same offense. *Benton* v. *Maryland*, 395 U. S. 784. The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' . . . If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.
>
> "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces

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plaintiffs and the intervenors, did not deprive the District Court of the power to certify the class action when it did and that, accordingly, a live controversy presently exists between the unnamed class members and the State. In *Sosna*, we observed:

"[T]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." *Id.*, at 402 n. 11.

Here the rapidity of judicial review of exceptions to masters' proposals creates mootness questions with respect to named plaintiffs, and even perhaps with respect to a series of intervening plaintiffs appearing thereafter, "before the district court can reasonably be expected to rule on a certification motion." *Ibid.*

In cases such as this one where mootness problems are likely to arise, district courts should heed strictly the requirement of Fed. Rule Civ. Proc. 23 (c)(1) that "[*a*]*s soon as practicable* after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." (Emphasis added.)

> the defendant's 'valued right to have his trial completed by a particular tribunal.' . . . Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona* v. *Washington*, 434 U. S. 497, 503–505 (1978) (footnotes omitted).

In the application of these general principles, the narrow question here [12] is whether the State in filing exceptions to a master's proposals, pursuant to Rule 911,[13] thereby "require[s] an accused to stand trial" a second time. We hold that it does not. Maryland has created a system with Rule 911 in which an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge.

Importantly, a Rule 911 proceeding does not impinge on the purposes of the Double Jeopardy Clause. A central purpose "of the prohibition against successive trials" is to bar "the

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[12] The State contends that jeopardy does not attach at the hearing before the master. Our decision in *Breed* v. *Jones*, 421 U. S. 519 (1975), however, suggests the contrary conclusion. "We believe it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." *Id.*, at 529. The California juvenile proceeding reviewed in *Breed* involved the use of a referee, or master, and was not materially different—for purposes of analysis of attachment of jeopardy—from a Rule 911 proceeding. See generally *In re Edgar M.*, 14 Cal. 3d 727, 537 P. 2d 406 (1975); cf. *Jesse W.* v. *Superior Court*, 20 Cal. 3d 893, 576 P. 2d 963 (1978).

It is not essential to decision in this case, however, to fix the precise time when jeopardy attaches.

[13] The District Court noted that Rule 911 differs from § 3–813, see *supra*, at 210–211, but concluded that under Maryland decisional law the Rule governs. 436 F. Supp., at 1365. The parties do not dispute the District Court's reading of state law. Accordingly, like the District Court, we consider only Rule 911 in resolving the constitutional challenge.

prosecution [from] another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States,* 437 U. S. 1, 11 (1978). A Rule 911 proceeding does not provide the prosecution that forbidden "second crack." The State presents its evidence once before the master. The record is then closed, and additional evidence can be received by the Juvenile Court judge only with the consent of the minor.

The Double Jeopardy Clause also precludes the prosecutor from "enhanc[ing] the risk that an innocent defendant may be convicted," *Arizona* v. *Washington, supra,* at 504, by taking the question of guilt to a series of persons or groups empowered to make binding determinations. Appellees contend that in its operation Rule 911 gives the State the chance to persuade two such factfinders: first the master, then the Juvenile Court judge. In support of this contention they point to evidence that juveniles and their parents sometimes consider the master "the judge" and his recommendations "the verdict." Within the limits of jury trial rights, see *McKeiver* v. *Pennsylvania,* 403 U. S. 528 (1971), and other constitutional constraints, it is for the State, not the parties, to designate and empower the factfinder and adjudicator. And here Maryland has conferred those roles only on the Juvenile Court judge. Thus, regardless of which party is initially favored by the master's proposals, and regardless of the presence or absence of exceptions, the judge is empowered to accept, modify, or reject those proposals.[14]

Finally, there is nothing in the record to indicate that the procedure authorized under Rule 911 unfairly subjects the defendant to the embarrassment, expense, and ordeal of a second trial proscribed in *Green* v. *United States,* 355 U. S.

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[14] It is not usual in a criminal proceeding for the evidence to be presented and recorded in the absence of the one authorized to determine guilt. But if there are any objections to such a system, they do not arise from the guarantees of the Double Jeopardy Clause.

184 (1957). Indeed, there is nothing to indicate that the juvenile is even brought before the judge while he conducts the "hearing on the record," or that the juvenile's attorney appears at the "hearing" and presents oral argument or written briefs. But even if there were such participation or appearance, the burdens are more akin to those resulting from a judge's permissible request for post-trial briefing or argument following a bench trial than to the "expense" of a full-blown second trial contemplated by the Court in *Green*.

In their effort to characterize a Rule 911 proceeding as two trials for double jeopardy purposes, appellees rely on two decisions of this Court, *Breed* v. *Jones*, 421 U. S. 519 (1975), and *United States* v. *Jenkins*, 420 U. S. 358 (1975).[15]

In *Breed*, we held that a juvenile was placed twice in jeopardy when, after an adjudicatory hearing in Juvenile Court on a charge of delinquent conduct, he was transferred to adult criminal court, tried, and convicted for the same conduct. All parties conceded that jeopardy attached at the second pro-

[15] Appellees also rely on *Kepner* v. *United States*, 195 U. S. 100 (1904). There a Manila lawyer was charged with embezzling the funds of his client. He was tried before the judge of a "court of first instance" and acquitted. The United States took an appeal to the Philippine Supreme Court, which, after reviewing the record, entered a judgment of guilty and imposed sentence. This Court held that an Act of Congress, which extended double jeopardy guarantees to the Philippines, required reversal of the conviction.

The differences between the present case and *Kepner* are material. There the trial judge was authorized to try serious criminal cases and to enter judgment, either of acquittal or conviction. The Philippine trial judge did not serve as an "assistant" or master of the Philippine Supreme Court for the purpose of making proposed findings to the appellate judges. *Id.*, at 115, 121, 133. Mr. Justice Brown in dissent accurately characterized the Philippine trial judge's role as embracing "the great and dangerous power of finally acquitting the most notorious criminals." *Id.*, at 137. The Philippine Supreme Court's role was appellate, and its jurisdiction was invoked by the Government's decision to appeal an otherwise binding judgment.

See also *Trono* v. *United States*, 199 U. S. 521 (1905).

ceeding in criminal court. The State contended, however, that jeopardy did not attach in the Juvenile Court proceeding, although that proceeding could have culminated in a deprivation of the juvenile's liberty. We rejected this contention and also the contention that somehow jeopardy "continued" from the first to the second trial. *Breed* is therefore inapplicable to the Maryland scheme, where juveniles are subjected to only one proceeding, or "trial."

Appellees also stress this language from *Jenkins:*

> "[I]t is enough for purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. *Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings* . . . . [To do so] would violate the Double Jeopardy Clause." 420 U. S., at 370 (emphasis added).

Although we doubt that the Court's decision in a case can be correctly identified by reference to three isolated sentences, any language in *Jenkins* must now be read in light of our subsequent decision in *United States* v. *Scott,* 437 U. S. 82 (1978). In *Scott* we held that it is not all proceedings requiring the making of supplemental findings that are barred by the Double Jeopardy Clause, but only those that follow a previous trial ending in an acquittal; in a conviction either not reversed on appeal or reversed because of insufficient evidence, see *Burks* v. *United States, supra;* or in a mistrial ruling not prompted by "manifest necessity," see *Arizona* v. *Washington,* 434 U. S. 497 (1978). A Juvenile Court judge's decision terminating a Rule 911 proceeding follows none of those occurrences. Furthermore, *Jenkins* involved appellate review of the final judgment of a trial court fully empowered to enter that judgment. Nothing comparable occurs in a Rule 911 proceeding. See n. 15, *supra.*

To the extent the Juvenile Court judge makes supplemental findings in a manner permitted by Rule 911—either *sua sponte*, in response to the State's exceptions, or in response to the juvenile's exceptions, and either on the record or on a record supplemented by evidence to which the parties raise no objection—he does so without violating the constraints of the Double Jeopardy Clause.

Accordingly, we reverse and remand for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, dissenting.

Appellees are a class of juveniles who, following adjudicatory hearings on charges of criminal conduct, were found nondelinquent by a "master." Because the State has labeled the master's findings as "proposed," the Court today allows the State in effect to appeal those findings to a "judge," who is empowered to reverse the master's findings and convict the juvenile. The Court's holding is at odds with the constitutional prohibition against double jeopardy, made applicable to the States by the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), and specifically held to apply to juvenile proceedings in *Breed* v. *Jones*, 421 U. S. 519 (1975).

The majority does not purport to retreat from our holding in *Breed*. Yet the Court reaches a result that it would not countenance were this a criminal prosecution against an adult, for the juvenile defendants here are placed twice in jeopardy just as surely as if an adult defendant, after acquittal in a trial court, were convicted on appeal. In addition to violating the Double Jeopardy Clause, Maryland's scheme raises serious due process questions because the judge making the final adjudication of guilt has not heard the evidence and may reverse the master's findings of nondelinquency based on

the judge's review of a cold record. For these reasons, I dissent.

I

While the first inquiry in any double jeopardy case must be whether jeopardy has attached, see *Crist* v. *Bretz*, 437 U. S. 28, 32–33 (1978); *Serfass* v. *United States*, 420 U. S. 377, 388 (1975), I agree with the Court that jeopardy does attach at the master's hearing, *ante*, at 215 n. 12. In *Breed* v. *Jones*, *supra*, we held that jeopardy attaches "at a proceeding whose object is to determine whether [a juvenile] has committed acts that violate a criminal law." 421 U. S., at 529. The master's hearing clearly has this as an object. Under Maryland law, the master is empowered to conduct a full "adjudicatory hearing," in order "to determine whether the allegations in the petition . . . are true." Rule 914 (a); Md. Cts. & Jud. Proc. Code Ann. § 3–801 (b) (Supp. 1977); see Rules 911, 914 (f).[1] And it is at this hearing that the State intro-

[1] Thus, unlike a preliminary hearing (to which the State analogizes a master's hearing), where the inquiry is one of probable cause, the adjudicatory hearing conducted by the master is the beginning of the unitary process designated by the State of Maryland to determine the truth of the charges. The Maryland Court of Special Appeals has rejected the State's argument that masters' hearings are not adjudicatory:

"We think it within the clear contemplation of the Maryland law that the 'adjudicatory hearing' is that phase of the total proceeding whereto witnesses are summonsed [*sic*]; whereat they are sworn, confronted with the alleged delinquent, examined and cross-examined; whereat their demeanor is observed, their credibility assessed and their testimony . . . transcribed by a court reporter; whereat the alleged delinquent is represented by counsel and where he enjoys the right to remain silent . . . ; whereat the State's Attorney marshals and presents the [State's] evidence . . . ; and whereat the presiding judge or master makes and announces his finding . . . .

"Conversely, we think it . . . equally clear . . . that the 'adjudicatory hearing' is not that phase of the proceeding, frequently conducted *ex parte* and . . . *in camera*, whereat the supervising judge ratifies, modifies or rejects the finding and recommendations of the master." *In re Brown*, 13 Md. App. 625, 632–633, 284 A. 2d 441, 444–445 (1971).

Although the *Brown* opinion was rendered prior to Maryland's revision of

duces the evidence on which it seeks to have the determination of guilt or innocence rest. See *Serfass* v. *United States, supra,* at 389. See also *Crist* v. *Bretz, supra,* at 51–52 (POWELL, J., dissenting).

My disagreement with the Court lies in its misapplication of well-settled double jeopardy rules applicable once jeopardy has attached. As the Court itself recognizes, *ante,* at 214, the Double Jeopardy Clause "unequivocally prohibits a second trial following an acquittal," *Arizona* v. *Washington,* 434 U. S. 497, 503 (1978). Just as unequivocally, it prevents the prosecution from seeking review or reversal of a judgment of acquittal on appeal. *Kepner* v. *United States,* 195 U. S. 100 (1904). And even where the first trial does not end in a final judgment, the "defendant's valued right to have his trial completed by a particular tribunal," absent a " 'manifest necessity' " for terminating the first proceedings, is protected by this Clause. *Wade* v. *Hunter,* 336 U. S. 684, 689–690 (1949), quoting *United States* v. *Perez,* 9 Wheat. 579, 580 (1824); see *ante,* at 214–215.

These rules are designed to serve the underlying purposes of the Double Jeopardy Clause, the most fundamental of which is to protect an accused from the governmental harassment and oppression that can so easily arise from the massed power of the State in confrontation with an individual. See *Green* v. *United States,* 355 U. S. 184, 187 (1957). As the Court recognizes, the Double Jeopardy Clause serves to preclude the State from having " 'another opportunity to supply evidence which it failed to muster in the first proceeding' "; to avoid the risk that a defendant, though in fact innocent, may be convicted by a successive decisionmaker; and to prevent the State from unfairly subjecting a defendant "to the embarrassment, expense, and ordeal of a second trial." *Ante,*

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its rules relating to the use of masters, see *ante,* at 209–210, the record before us indicates that the character of the hearing has not materially changed since that decision.

at 216. It is against these touchstones of law that the Maryland scheme must be evaluated.

A

After rejecting the State's chief argument—that jeopardy does not attach in hearings before a master—the Court reaches its result primarily by ignoring the undisputed fact that state law commits to the master a factfinding function. Admittedly, the Maryland proceedings are somewhat difficult to classify into the customary pigeonholes of double jeopardy analysis, but that is precisely because the State has engaged in a novel redefinition of trial and appellate functions in a quasi-criminal proceeding, intentionally designed to avoid the constraints of the Double Jeopardy Clause.[2] While a State is, of course, free to designate a "master," a "judge," or some other officer to conduct juvenile adjudicatory hearings, our Constitution is not so fragile an instrument that its substantive prohibitions may be evaded by formal designations that fail to correspond with the actual functions performed.

Viewing the master and judge in terms of their relative functions, I think the appropriate analogy is between a trial judge and an appellate court with unusually broad powers of review. In the cases before us, the masters had made unequivocal findings, on the facts, that the State had not proved its case, and the State sought to have the judge overturn these findings.[3] By ignoring these functional considerations,

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[2] In response to an earlier decision holding that a second hearing before the judge, when the State excepted to the master's findings of nondelinquency, violated the Double Jeopardy Clause, *Aldridge* v. *Dean*, 395 F. Supp. 1161 (Md. 1975), the State of Maryland modified its procedures to preclude a new hearing before the juvenile judge on the State's exceptions, unless both "parties" consent. See *ante*, at 210–211, 212. Following passage of these amended rules, the State moved to dismiss the instant proceeding as moot; the motion was denied.

[3] For example, in one instance, the State's case rested on the identification testimony of the victim of a bicycle theft. At the close of the

the Court permits the State to circumvent the protections of the Double Jeopardy Clause by a mere change in the formal definitions of finality. The Court thus makes the linchpin of its holding a formalism that belies our insistence that "courts eschew . . . 'label[s]-of-convenience . . . attached to juvenile proceedings,' *In re Gault*, [387 U. S. 1,] 50 [(1967)], and that 'the juvenile process . . . be candidly appraised,' [*id.*,] at 21." *Breed* v. *Jones*, 421 U. S., at 529.

(1)

The Court describes the Maryland system as one permitting "the presentation and recording of evidence in the absence of the only officer authorized by the state constitution . . . and by statute . . . to serve as the factfinder and judge." *Ante*, at 212. It is inaccurate, however, to say that only the judge is "authorized" under Maryland law to act as a factfinder.[4] The master does not simply act as a referee at the hearing, deciding evidentiary questions and creating a record placed before the judge. Rather, Rule 911 directs that, at the end of the disposition hearing (which follows the adjudicatory hearing), the master "transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition." Rule 911 (b).[5]

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evidence, the master announced that, because he was not persuaded beyond a reasonable doubt of the accuracy of the witness' identification, especially since it was uncorroborated, he found the defendant not guilty. *In re McLean*, summarized in 8 Record, Petitioner's Exhibit No. 49, p. 16. On the State's exception, the juvenile judge convicted the defendant.

[4] It is not disputed here that, under the Maryland State Constitution, the State may validly delegate to masters authority to make proposed findings of fact under Rule 911.

[5] We therefore need not rely on appellees' statistical proof, convincing as it may be, to conclude that in Maryland masters are supposed to find facts. Appellees' evidence, however, supports this interpretation of Maryland law.

In Baltimore City in 1975 and 1976, there were seven masters and one

That Maryland contemplates an actual factfinding function for the master is emphasized by the fact that neither the Rule nor the statute requires the "judge" to read the entire record, listen to the tape recording of the adjudicatory hearing, or otherwise expose himself to the full factual record as it was presented to the master. Indeed, the Rule expressly recognizes that the judge may enter his order "based on" the master's findings. Rule 911 (d). The master himself thus serves as a factfinder of first instance; while his findings are only "proposed," they may be accepted by the judge without an independent review of the entire record.

Juvenile Court Judge. The District Court found that, except when the State filed an exception, all of the masters' recommended findings of nondelinquency had been approved by the judge. 436 F. Supp. 1361, 1364 (Md. 1977) (three-judge court).

Moreover, the first judge presented with appellees' double jeopardy claim—the state trial judge serving as the only Juvenile Court Judge in Baltimore from 1967–1975—agreed with the juveniles that permitting the State to take exceptions violated the Double Jeopardy Clause. His conclusion rested in part on his perception that

"it is impossible for the Judge . . . , who also carries a full docket of cases himself, to exercise any independent, meaningful judgment in the overwhelming majority of the many thousands of [masters'] orders put before him each year . . . . With this being the case it is difficult to see how realistically a Master can be called only an adviser . . . . [T]he Master conducts, for all intents and purposes, full blown and complete proceedings through the adjudicatory and dispositional phases and . . . as a practical matter he imposes sanctions and can effectively deprive youngsters of their freedom." *In re Anderson*, No. 158187 (Cir. Ct. Balt. City, Juv. Div., Aug. 1, 1973), p. 39.

The Juvenile Court Judge's decision was ultimately reversed on appeal. *In re Anderson*, 272 Md. 85, 321 A. 2d 516 (1974).

A report of the State Commission on Juvenile Justice in January 1977, after spending 18 months studying the Maryland juvenile courts, reached the same conclusion: "[W]ithout bearing legal responsibility for his decisions, the Master's recommended decisions become, in effect, final orders of the Court." Final Report of the Commission on Juvenile Justice to the Governor and General Assembly of Maryland 13 (1977).

(2)

In *Kepner* v. *United States*, 195 U. S. 100 (1904), we held that the Double Jeopardy Clause prohibited an appellate court in the Philippines from reversing a verdict of acquittal rendered by the trial court in a bench trial and entering a verdict of guilty.[6] The Government had argued that, under controlling Spanish law, "[t]he original trial is a unitary and continuous thing, and is not complete until the appellate court has pronounced judgment." Brief for United States, O. T. 1903, No. 244, p. 39. This Court, however, held that American constitutional law governed and that the Double Jeopardy Clause prohibited the Government from appealing a judgment of acquittal entered by the first trier of facts. In so holding, the Court rejected Mr. Justice Holmes' "continuing jeopardy" argument, 195 U. S., at 134–137 (dissenting opinion), an argument that we have consistently refused to adopt, see, *e. g.*, *United States* v. *Wilson*, 420 U. S. 332, 352 (1975), and to which the State's position here bears an uncomfortable resemblance.[7]

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[6] In *Kepner*, the Court was technically construing an Act of Congress extending certain procedural protections to criminal trials conducted in the Philippines, which was a United States possession. However, the Court made clear that it construed the statutory language to incorporate the constitutional principles of double jeopardy, see 195 U. S., at 124, and its decision is thus properly regarded by the Court today as a constitutional one, see *ante*, at 217 n. 15.

[7] The Court explained the Spanish system of jeopardy, which the Government urged as applicable, as follows:

"Under that system of law . . . a person was not . . . in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally convicted or acquitted until the case had been passed upon in the . . . Supreme Court . . . . The trial was regarded as one continuous proceeding, and the protection given was against a second conviction after this final trial had been concluded in due form of law." 195 U. S., at 121.

The Court went on to make plain that this definition of finality of judg-

There are, of course, differences between *Kepner* and the instant case. In *Kepner* the court of first instance apparently had authority to enter an adjudication that would be final absent an appeal by either party, whereas here the masters do not have power to enter a final order of acquittal. But as we have repeatedly emphasized, an "acquittal" is not necessarily determined by the form of the order. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977); see *United States* v. *Wilson*, *supra*, at 336; *United States* v. *Sisson*, 399 U. S. 267, 270 (1970). As the *Kepner* Court noted in support of its holding that a bench acquittal could not be appealed, a jury verdict of acquittal, even when not followed by a formal judgment of the trial court, bars further proceedings under the Double Jeopardy Clause. 195 U. S., at 130. Here, while the master does not formally make a final adjudication, in all other respects his proposed finding of nondelinquency is fully equivalent to an acquittal: after a plenary adjudicatory hearing, he makes "a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co.*, *supra*, at 571. And the State's exception to the master's finding of nondelinquency engenders the same anxiety and burden as would a State's appeal from an adult court's verdict of acquittal.

The Court's rationale allows States to avoid the *Kepner* holding by the simple expedient of changing the definitions of finality without changing the functions performed by judges at different levels of decision. The decision today might well be read to hold that the Double Jeopardy Clause is no bar to structuring a juvenile justice system or, for that matter, an

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ments of acquittal was inconsistent with our Double Jeopardy Clause. Thus it wrote that "[t]he court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense, if Congress used the terms as construed by this court in passing upon their meaning." *Id.*, at 133.

adult criminal justice system so as to have several layers of adjudication, none of which is final until the State has exhausted its last appeal.[8] This proliferation of levels at which a defendant—juvenile or adult—must defend himself against an adjudication of guilt is precisely the kind of evil that the Double Jeopardy Clause was designed to forbid. Yet under the Court's rationale, this is seemingly permissible so long as the State takes care to define the lower levels of decision-making as only "proposed" or "tentative" in nature, thereby commingling traditional trial and appellate functions.

B

Even if the master's findings are not regarded as an acquittal, the Double Jeopardy Clause does more than simply protect acquittals from review on direct appeal. It also protects the defendant's right to go to judgment before a "particular tribunal" once jeopardy has attached, absent a " 'manifest necessity' " justifying termination of the first proceeding. *Wade* v. *Hunter*, 336 U. S., at 689–690. This rule is designed in part to ensure that the government not be able to bolster its case by additional evidence or arguments, once it believes that its evidence has not persuaded the first tribunal. See *Arizona* v. *Washington*, 434 U. S., at 503–505, and n. 14. But

[8] Thus, for example, a State might provide that in all bench trials, a judgment of acquittal does not become "final" for a certain amount of time in which an appellate court may review it. While this is an unlikely eventuality, it points up the fallacy in the Court's reasoning.

Fortunately, the damage done by the Court's holding today is limited in its application by the Sixth Amendment right to a jury trial. Not only would it offend the Double Jeopardy Clause for a jury's verdict of acquittal to be set aside (whether or not a judgment were entered on the verdict), see *United States* v. *Sanges*, 144 U. S. 310 (1892), cited in *Kepner* v. *United States*, 195 U. S., at 130, but it would also dilute the constitutional right to a jury trial in criminal cases. The jury trial right has been held inapplicable to juvenile proceedings, however. See *McKeiver* v. *Pennsylvania*, 403 U. S. 528 (1971).

the Maryland system is structured so as to give the State precisely this type of proscribed opportunity, where it disagrees with the favorable rulings of the first trier of fact.

As recognized by the Court, jeopardy attaches at the master's hearing. This hearing is a formal, adjudicatory proceeding at which the State's witnesses testify and are cross-examined; the juvenile may present evidence in his own defense; and the juvenile is entitled to counsel and to remain silent. Presentation of evidence at that proceeding is keyed to the reactions and attitudes of the presiding master, who acts, for purposes of the adjudicatory hearing, as the "particular tribunal." A juvenile who has had such a hearing may justifiably expect that, when the master who has heard all this evidence announces a finding in his favor, it will be final. But a juvenile tried before a master in Maryland is never, as a matter of law, entitled to have his trial "completed" before the master, since his recommendations must be confirmed by the judge and may be ignored by him.

Thus, endemic to the Maryland system is a kind of interrupted proceeding which ensures that the defendant cannot get the benefit of the first trier of fact's reaction to the evidence. The system thereby poses a substantial risk that innocent defendants may be found guilty, since it allows the State a second opportunity to persuade a decisionmaker of the juvenile's guilt, after the first trier of fact has concluded that the State has not proved its case. See *Ashe* v. *Swenson*, 397 U. S. 436, 446 (1970). Unless justified by a "manifest necessity"—not present here—the Double Jeopardy Clause condemns such a system. As we wrote in *Green* v. *United States*, 355 U. S., at 187–188, the "underlying idea" of the Double Jeopardy Clause

> "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him

> to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

For these reasons, I conclude that the Maryland Rule, insofar as it permits a judge to review and set aside a master's findings favorable to the defendant on the facts of the case, violates the Double Jeopardy Clause.

II

As the majority accurately states, the only issue raised in the complaints or focused upon in the parties' briefs was that of double jeopardy. It is argued by *amicus*, however, that the Maryland system, even if it were found to avoid double jeopardy problems, violates the Due Process Clause by permitting ultimate factfinding by a judge who did not actually conduct the trial.[9] The Court does not reach this issue, apparently believing that it is not properly presented here.[10]

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[9] Brief of State Public Defender of California as *Amicus Curiae*.

[10] Although the Court does not reach this issue, cf. *Dandridge* v. *Williams*, 397 U. S. 471, 475–476, n. 6 (1970) (when "attention has been focused on other issues," remand may be appropriate), I believe it would be within its power to do so. See *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937) (Brandeis, J.). Affirming the judgment below on this ground would not have the effect of expanding the relief granted: an injunction against the State's taking of exceptions. See *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166 n. 8 (1977). While the due process claim was not raised in appellees' complaints, it was argued in substance to the District Court in opposition to appellants' motion to dismiss the complaint. See Plaintiffs' Memorandum in Response to Motion to Dismiss 9 n. 29, 2 Record Exhibit 19; Plaintiffs' Memorandum in Opposition to Motion to Dismiss, 2 Record Exhibit 29. Moreover, appellees' brief here makes the following argument: "It is only logical to assume that if a case is tried before enough judicial officers, one of them will eventually conclude that the defendant is guilty beyond a reasonable doubt. . . . [S]uch a process would emasculate this Court's decision in *In re Winship*, 397 U. S. 358 (1970)." Brief for Appellees 86. While this is not identical to the due process argument urged by *amicus*, it illustrates the intimate

See *ante*, at 212, 213, 216 n. 14, 219. It is thus important to emphasize that the Maryland system and ones like it have not been held constitutional today; the Court's only holding is that such systems are not unconstitutional under the Double Jeopardy Clause. It is entirely open to this Court, and lower courts, to find in another case that a system like that in Maryland violates the Due Process Clause.

In *In re Winship*, 397 U. S. 358 (1970), we held that a juvenile accused of a crime may be convicted only upon proof beyond a reasonable doubt, even if he is prosecuted in a juvenile court. The rationale of *Winship* suggests that the Due Process Clause requires the most reliable procedures to be used in making the reasonable-doubt determination in juvenile proceedings. As we have repeatedly emphasized:

> " 'To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute . . . . Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.' " *Wingo* v. *Wedding*, 418 U. S. 461, 474 (1974), quoting *Speiser* v. *Randall*, 357 U. S. 513, 520 (1958).

Over 30 years ago, in *Holiday* v. *Johnston*, 313 U. S. 342 (1941), we recognized the importance to a reliable factfinding process of hearing live witnesses. The issue there was whether, on a federal habeas corpus petition, a District Judge could utilize a United States Commissioner to hold the evidentiary hearing and make recommended findings of fact and conclusions of law. Although our holding that the prisoner had a right to testify and present his evidence before a judge was a statutory one, our reasoning went to the fundamental nature

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relationship between the double jeopardy and due process problems inherent in the Maryland scheme.

of the kind of factfinding on which many judicial determinations must rest:

> "One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. . . . We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts." *Id.*, at 352.

Four Terms ago, in *Wingo* v. *Wedding, supra,* we adhered to this view, holding that the successor habeas corpus statute also required the district judge personally to conduct evidentiary hearings in habeas corpus cases. We not only disapproved the practice of referring evidentiary hearings to masters, but also held that the judge's listening to an electronic recording of the testimony was no substitute for his personally hearing and observing the witnesses to evaluate their credibility.

These decisions arose in the context of habeas corpus proceedings, where the prisoner has the burden of demonstrating that he is being held in violation of the Constitution. In a criminal proceeding, where the issue posed is the threshold one of whether a defendant has been proved guilty of a crime beyond a reasonable doubt, the same considerations surely have at least as much force. Indeed, the need for achieving the most reliable determinations of evidentiary facts, and particularly of credibility, exists *a fortiori* where the factual determinations must be made beyond a reasonable doubt.

As the Maryland courts have held, *In re Brown,* 13 Md. App. 625, 632–633, 284 A. 2d 441, 444–445 (1971), and as is self-evident from the structure of Rule 911, the master's function at the hearing is, in large part, to assess the credibility of the witnesses. That function simply cannot be replicated by the "judge," acting in his essentially appellate capacity reviewing the record; as *amicus* cogently notes, "[t]rials-by-transcript can never be more than trials by substantial evi-

dence." [11] It would thus appear that the Maryland system of splitting the hearing of evidence from the final adjudication violates the Due Process Clause.

It is no answer to this problem that the juvenile defendant may elect to submit additional material to the judge when the State takes an exception to the master's finding. In the first place, the State apparently must agree to the supplementation of the record, and can thus stymie a defendant's efforts to persuade the judge that he is not guilty. See Rule 911 (c). But more importantly, when a juvenile seeks to reopen the proceeding before the judge—in order to avoid having a case decided against him on the basis of a cold record in violation of the Due Process Clause—he is being subjected to a second trial of the sort clearly prohibited by the Double Jeopardy Clause. The constitutionality of forcing a juvenile to such a choice between fundamental rights is questionable at best. Cf. *United States* v. *Jackson*, 390 U. S. 570 (1968); *North Carolina* v. *Pearce*, 395 U. S. 711 (1969).

III

That the current Maryland scheme cannot pass constitutional muster does not necessarily mean that the idea of using masters, or some other class of specially trained or selected personnel for juvenile court adjudications, is either unconstitutional or unwise. Using masters to adjudicate the more common charges may save scarce judicial resources for the more difficult cases. It may also aid the ultimate goals of a juvenile justice system by ensuring that the decisionmakers have some familiarity with the special problems of juvenile dispositions. But the State must find a way of implementing this concept without jeopardizing the constitutional rights of juveniles. Whether it does so by endowing masters with the power to make final adjudications or by some other means,

[11] Brief for State Public Defender of California as *Amicus Curiae* 26.

matters not. What does matter is that, absent compelling circumstances not present here, the system of juvenile justice in this country must not be permitted to fall below the minimum constitutional standards set for adult criminal proceedings.

Accordingly, I dissent.

ALLIED STRUCTURAL STEEL CO. *v.* SPANNAUS, ATTORNEY GENERAL OF MINNESOTA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 77–747. Argued April 25, 1978—Decided June 28, 1978

Appellant, an Illinois corporation, maintained an office in Minnesota with 30 employees. Under appellant's pension plan, adopted in 1963 and qualified under § 401 of the Internal Revenue Code, employees were entitled to retire and receive a pension at age 65 regardless of length of service, and an employee's pension right became vested if he satisfied certain conditions as to length of service and age. Appellant was the sole contributor to the pension trust fund, and each year made contributions to the fund based on actuarial predictions of eventual payout needs. But the plan neither required appellant to make specific contributions nor imposed any sanction on it for failing to make adequate contributions, and appellant retained a right not only to amend the plan but also to terminate it at any time and for any reason. In 1974, Minnesota enacted the Private Pension Benefits Protection Act (Act), under which a private employer of 100 employees or more (at least one of whom was a Minnesota resident) who provided pension benefits under a plan meeting the qualifications of § 401 of the Internal Revenue Code, was subject to a "pension funding charge" if he terminated the plan or closed a Minnesota office. The charge was assessed if the pension funds were insufficient to cover full pensions for all employees who had worked at least 10 years, and periods of employment prior to the effective date of the Act were to be included in the 10-year employment criterion. Shortly thereafter, in a move planned before passage of the Act, appellant closed its Minnesota office, and several of its employees, who were then discharged, had no vested pension rights under appellant's plan but had worked for appellant for 10 years or more, thus qualifying as pension obligees under the Act. Subsequently, the State notified appellant that it owed a pension funding charge of $185,000 under the Act. Appellant then brought suit in Federal District Court for injunctive and declaratory relief, claiming that the Act unconstitutionally impaired its contractual obligations to its employees under its pension plan, but the court upheld the Act as applied to appellant. *Held:* The application of the Act to appellant violates the Contract Clause of the Constitution, which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." Pp. 240–251.

(a) While the Contract Clause does not operate to obliterate the police power of the States, it does impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co.* v. *New Jersey*, 431 U. S. 1, 22. Pp. 242–244.

(b) The impact of the Act upon appellant's contractual obligations was both substantial and severe. Not only did the Act retroactively modify the compensation that appellant had agreed to pay its employees from 1963 to 1974, but it did so by changing appellant's obligations in an area where the element of reliance was vital—the funding of a pension plan. Moreover, the retroactive state-imposed vesting requirement was applied only to those employers who terminated their pension plans or who, like appellant, closed their Minnesota offices, thus forcing the employer to make all the retroactive changes in its contractual obligations at one time. Pp. 244–247.

(c) The Act does not possess the attributes of those state laws that have survived challenge under the Contract Clause. It was not even purportedly enacted to deal with a broad, generalized economic or social problem, cf. *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 445, but has an extremely narrow focus and enters an area never before subject to regulation by the State. Pp. 247–250.

449 F. Supp. 644, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 251. BLACKMUN, J., took no part in the consideration or decision of the case.

George B. Christensen argued the cause for appellant. With him on the briefs were *Chester W. Nosal* and *John R. Kenefick*.

Byron E. Starns, Chief Deputy Attorney General of Minnesota, argued the cause for appellees. With him on the brief were *Warren Spannaus*, Attorney General, *pro se*, *Richard B. Allyn*, Solicitor General, and *Kent G. Harbison*, *Richard A.*

Lockridge, and *Jon K. Murphy*, Special Assistant Attorneys General.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The issue in this case is whether the application of Minnesota's Private Pension Benefits Protection Act [1] to the appellant violates the Contract Clause of the United States Constitution.

I

In 1974 appellant Allied Structural Steel Co. (company), a corporation with its principal place of business in Illinois, maintained an office in Minnesota with 30 employees. Under the company's general pension plan, adopted in 1963 and qualified as a single-employer plan under § 401 of the Internal Revenue Code, 26 U. S. C. § 401 (1976 ed.),[2] salaried employees were covered as follows: At age 65 an employee was entitled to retire and receive a monthly pension generally computed by multiplying 1% of his average monthly earnings by the total number of his years of employment with the company.[3] Thus, an employee aged 65 or more could retire without satisfying any particular length-of-service requirement, but the size of his pension would reflect the length of his service with the company.[4] An employee could also

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**Peter G. Nash*, *Eugene B. Granof*, and *Stanley T. Kaleczyc* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

[1] Minn. Stat. § 181B.01 *et seq.* (1974). This is the same Act that was considered in *Malone* v. *White Motor Corp.*, 435 U. S. 497, a case presenting a quite different legal issue.

[2] The plan was not the result of a collective-bargaining agreement, and no such agreement is at issue in this case.

[3] The employee could elect to receive instead a lump-sum payment.

[4] Thus, an employee whose average monthly earnings were $800 and who retired at 65 would receive eight dollars monthly if he had worked one year for the company and $320 monthly if he had worked for the company for 40 years.

become entitled to receive a pension, payable in full at age 65, if he met any one of the following requirements: (1) he had worked 15 years for the company and reached the age of 60; or (2) he was at least 55 years old and the sum of his age and his years of service with the company was at least 75; or (3) he was less than 55 years old but the sum of his age and his years of service with the company was at least 80. Once an employee satisfied any one of these conditions, his pension right became vested in the sense that any subsequent termination of employment would not affect his right to receive a monthly pension when he reached 65. Those employees who quit or were discharged before age 65 without fulfilling one of the other three conditions did not acquire any pension rights.

The company was the sole contributor to the pension trust fund, and each year it made contributions to the fund based on actuarial predictions of eventual payout needs. Although those contributions once made were irrevocable, in the sense that they remained part of the pension trust fund, the plan neither required the company to make specific contributions nor imposed any sanction on it for failing to contribute adequately to the fund.

The company not only retained a virtually unrestricted right to amend the plan in whole or in part, but was also free to terminate the plan and distribute the trust assets at any time and for any reason. In the event of a termination, the assets of the fund were to go, first, to meet the plan's obligation to those employees already retired and receiving pensions; second, to those eligible for retirement; and finally, if any balance remained, to the other employees covered under the plan whose pension rights had not yet vested.[5] Employees within each of these categories were assured payment only to the extent of the pension assets.

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[5] Apart from termination of the fund and distribution of the trust assets, there was no other situation in which employees in this third category would receive anything from the pension fund.

The plan expressly stated:

> "No employee shall have any right to, or interest in, any part of the Trust's assets upon termination of his employment or otherwise, except as provided from time to time under this Plan, and then only to the extent of the benefits payable to such employee out of the assets of the Trust. All payments of benefits as provided for in this Plan shall be made solely out of the assets of the Trust and neither the employer, the trustee, nor any member of the Committee shall be liable therefor in any manner."

The plan also specifically advised employees that neither its existence nor any of its terms were to be understood as implying any assurance that employees could not be dismissed from their employment with the company at any time.

In sum, an employee who did not die, did not quit, and was not discharged before meeting one of the requirements of the plan would receive a fixed pension at age 65 if the company remained in business and elected to continue the pension plan in essentially its existing form.

On April 9, 1974, Minnesota enacted the law here in question, the Private Pension Benefits Protection Act, Minn. Stat. §§ 181B.01–181B.17. Under the Act, a private employer of 100 employees or more—at least one of whom was a Minnesota resident—who provided pension benefits under a plan meeting the qualifications of § 401 of the Internal Revenue Code, was subject to a "pension funding charge" if he either terminated the plan or closed a Minnesota office.[6] The charge was assessed if the pension funds were not sufficient to cover full pensions for all employees who had worked at least 10 years. The Act required the employer to satisfy the deficiency by purchasing deferred annuities, payable to the employees at their normal retirement age. A separate provi-

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[6] Although the company had only 30 employees in Minnesota, it was subject to the Act because it had over 100 employees altogether.

sion specified that periods of employment prior to the effective date of the Act were to be included in the 10-year employment criterion.[7]

During the summer of 1974 the company began closing its Minnesota office. On July 31, it discharged 11 of its 30 Minnesota employees, and the following month it notified the Minnesota Commissioner of Labor and Industry, as required by the Act, that it was terminating an office in the State.[8] At least nine of the discharged employees did not have any vested pension rights under the company's plan, but had worked for the company for 10 years or more and thus qualified as pension obligees of the company under the law that Minnesota had enacted a few months earlier. On August 18, the State notified the company that it owed a pension funding charge of approximately $185,000 under the provisions of the Private Pension Benefits Protection Act.

The company brought suit in a Federal District Court ask-

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[7] Entitled "Nonvested Benefits Prior to Act," Minn. Stat. § 181B.04 provided:

"Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17."

[8] According to the stipulated facts, the closing of the company's Minnesota office resulted from a shift of that office's duties to the main company office in Illinois the previous December. The closing was not completed until February 1975, by which time the Minnesota Act had been pre-empted by federal law. See *Malone* v. *White Motor Corp.*, 435 U. S., at 499. We deal here solely with the application of the Minnesota Act to the 11 employees discharged in July 1974.

ing for injunctive and declaratory relief. It claimed that the Act unconstitutionally impaired its contractual obligations to its employees under its pension agreement. The three-judge court upheld the constitutional validity of the Act as applied to the company, *Fleck* v. *Spannaus*, 449 F. Supp. 644, and an appeal was brought to this Court under 28 U. S. C. § 1253 (1976 ed.).[9] We noted probable jurisdiction. 434 U. S. 1045.

II

A

There can be no question of the impact of the Minnesota Private Pension Benefits Protection Act upon the company's contractual relationships with its employees. The Act substantially altered those relationships by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake. But it does not inexorably follow that the Act, as applied to the company, violates the Contract Clause of the Constitution.

The language of the Contract Clause appears unambiguously absolute: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U. S. Const., Art. I, § 10. The Clause is not, however, the Draconian provision that its words might seem to imply. As the Court has recognized, "literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection." *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 433.[10]

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[9] The claims of Walter Fleck and the other two individual plaintiffs were dismissed by the District Court for lack of standing, *Fleck* v. *Spannaus*, 421 F. Supp. 20, leaving only the company as an appellant. Warren Spannaus, the Attorney General of Minnesota, is an appellee.

[10] See generally B. Schwartz, A Commentary on the Constitution of the United States, Pt. 2, The Rights of Property 266–306 (1965); B. Wright, The Contract Clause of the Constitution (1938).

Although it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation,[11] the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history.[12] Nonetheless, the Contract Clause remains part of the Constitution. It is not a dead letter. And its basic contours are brought into focus by several of this Court's 20th-century decisions.

First of all, it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault* v. *Springs*, 199 U. S. 473, 480. As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract

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[11] Perhaps the best known of all Contract Clause cases of that era was *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

[12] Indeed, at least one commentator has suggested that "the results might be the same if the contract clause were dropped out of the Constitution, and the challenged statutes all judged as reasonable or unreasonable deprivations of property." Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. 852, 890–891 (1944).

about them. The contract will carry with it the infirmity of the subject matter."

B

If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. The existence and nature of those limits were clearly indicated in a series of cases in this Court arising from the efforts of the States to deal with the unprecedented emergencies brought on by the severe economic depression of the early 1930's.

In *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, the Court upheld against a Contract Clause attack a mortgage moratorium law that Minnesota had enacted to provide relief for homeowners threatened with foreclosure. Although the legislation conflicted directly with lenders' contractual foreclosure rights, the Court there acknowledged that, despite the Contract Clause, the States retain residual authority to enact laws "to safeguard the vital interests of [their] people." *Id.*, at 434. In upholding the state mortgage moratorium law, the Court found five factors significant. First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. *Id.*, at 444. Second, the state law was enacted to protect a basic societal interest, not a favored group. *Id.*, at 445. Third, the relief was appropriately tailored to the emergency that it was designed to meet. *Ibid.* Fourth, the imposed conditions were reasonable. *Id.*, at 445–447. And, finally, the legislation was limited to the duration of the emergency. *Id.*, at 447.

The *Blaisdell* opinion thus clearly implied that if the Minnesota moratorium legislation had not possessed the characteristics attributed to it by the Court, it would have been invalid under the Contract Clause of the Constitution.[13]

[13] In *Veix* v. *Sixth Ward Building & Loan Assn.*, 310 U. S. 32, 38, the Court took into account still another consideration in upholding a state

These implications were given concrete force in three cases that followed closely in *Blaisdell*'s wake.

In *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, the Court dealt with an Arkansas law that exempted the proceeds of a life insurance policy from collection by the beneficiary's judgment creditors. Stressing the retroactive effect of the state law, the Court held that it was invalid under the Contract Clause, since it was not precisely and reasonably designed to meet a grave temporary emergency in the interest of the general welfare. In *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, the Court was confronted with another Arkansas law that diluted the rights and remedies of mortgage bondholders. The Court held the law invalid under the Contract Clause. "Even when the public welfare is invoked as an excuse," Mr. Justice Cardozo wrote for the Court, the security of a mortgage cannot be cut down "without moderation or reason or in a spirit of oppression." *Id.,* at 60. And finally, in *Treigle* v. *Acme Homestead Assn.,* 297 U. S. 189, the Court held invalid under the Contract Clause a Louisiana law that modified the existing withdrawal rights of the members of a building and loan association. "Such an interference with the right of contract," said the Court, "cannot be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that in the same interest their charters may be amended." *Id.,* at 196.

The most recent Contract Clause case in this Court was *United States Trust Co.* v. *New Jersey,* 431 U. S. 1.[14] In

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law against a Contract Clause attack: the petitioner had "purchased into an enterprise already regulated in the particular to which he now objects."

[14] See also *El Paso* v. *Simmons,* 379 U. S. 497. There the Court held that a Texas law shortening the time within which a defaulted land claim could be reinstated did not violate the Contract Clause. "We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible right to reinstatement . . . or that he interpreted that right to be of everlasting effect. At the time the contract was entered into the State's policy was to

that case the Court again recognized that although the absolute language of the Clause must leave room for "the 'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens," *id.*, at 21, that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Id.*, at 22. Evaluating with particular scrutiny a modification of a contract to which the State itself was a party, the Court in that case held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither necessary nor reasonable.[15]

III

In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.[16]

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sell the land as quickly as possible . . . ." *Id.*, at 514. In sum, "[t]he measure taken . . . was a mild one indeed, hardly burdensome to the purchaser . . . but nonetheless an important one to the State's interest." *Id.*, at 516–517.

[15] The Court indicated that impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties, 431 U. S., at 22–23, although it was careful to add that "private contracts are not subject to unlimited modification under the police power." *Id.*, at 22.

[16] The novel construction of the Contract Clause expressed in the dissenting opinion is wholly contrary to the decisions of this Court. The narrow view that the Clause forbids only state laws that diminish the duties of a contractual obligor and not laws that increase them, a view arguably suggested by *Satterlee* v. *Matthewson*, 2 Pet. 380, has since been expressly repudiated. *Detroit United R. Co.* v. *Michigan*, 242 U. S. 238;

The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage.[17] Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Here, the company's contracts of employment with its employees included as a fringe benefit or additional form of compensation, the pension plan. The company's maximum obligation was to set aside each year an amount based on the plan's requirements for vesting. The plan satisfied the current federal income tax code and was subject to no other legislative requirements. And, of course, the company was free to amend or terminate the pension plan at any time. The company thus had no reason to anticipate that its employees'

Georgia R. & Power Co. v. *Decatur*, 262 U. S. 432. See also, *e. g.*, *Sherman* v. *Smith*, 1 Black 587; *Bernheimer* v. *Converse*, 206 U. S. 516, 530; *Henley* v. *Myers*, 215 U. S. 373; *National Surety Co.* v. *Architectural Decorating Co.*, 226 U. S. 276; *Columbia R., Gas & Electric Co.* v. *South Carolina*, 261 U. S. 236; *Stockholders of Peoples Banking Co.* v. *Sterling*, 300 U. S. 175. Moreover, in any bilateral contract the diminution of duties on one side effectively increases the duties on the other.

The even narrower view that the Clause is limited in its application to state laws relieving debtors of obligations to their creditors is, as the dissent recognizes, *post*, at 257 n. 5, completely at odds with this Court's decisions. See *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Wood* v. *Lovett*, 313 U. S. 362; *El Paso* v. *Simmons*, *supra*. See generally Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 512, 514–516 (1944).

[17] See n. 14, *supra*.

pension rights could become vested except in accordance with the terms of the plan. It relied heavily, and reasonably, on this legitimate contractual expectation in calculating its annual contributions to the pension fund.

The effect of Minnesota's Private Pension Benefits Protection Act on this contractual obligation was severe. The company was required in 1974 to have made its contributions throughout the pre-1974 life of its plan as if employees' pension rights had vested after 10 years, instead of vesting in accord with the terms of the plan. Thus a basic term of the pension contract—one on which the company had relied for 10 years—was substantially modified. The result was that, although the company's past contributions were adequate when made, they were not adequate when computed under the 10-year statutory vesting requirement. The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10-year vesting requirement.

Not only did the state law thus retroactively modify the compensation that the company had agreed to pay its employees from 1963 to 1974, but also it did so by changing the company's obligations in an area where the element of reliance was vital—the funding of a pension plan.[18] As the Court has recently recognized:

> "These [pension] plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the

[18] In some situations the element of reliance may cut both ways. Here, the company had relied upon the funding obligation of the pension plan for more than a decade. There was no showing of reliance to the contrary by its employees. Indeed, Minnesota did not act to protect any employee reliance interest demonstrated on the record. Instead, it compelled the employer to exceed bargained-for expectations and nullified an express term of the pension plan.

> calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect." *Los Angeles Dept. of Water & Power* v. *Manhart,* 435 U. S. 702, 721.

Moreover, the retroactive state-imposed vesting requirement was applied only to those employers who terminated their pension plans or who, like the company, closed their Minnesota offices. The company was thus forced to make all the retroactive changes in its contractual obligations at one time. By simply proceeding to close its office in Minnesota, a move that had been planned before the passage of the Act, the company was assessed an immediate pension funding charge of approximately $185,000.

Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. There is not even any provision for gradual applicability or grace periods. Cf. the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. §§ 1061 (b)(2), 1086 (b), and 1144 (1976 ed.). See n. 23, *infra.* Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. The presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure," *United States Trust Co.,* 431 U. S., at 23, simply cannot stand in this case.

The only indication of legislative intent in the record before us is to be found in a statement in the District Court's opinion:

> "It seems clear that the problem of plant closure and pension plan termination was brought to the attention

of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants and attempted to terminate its pension plan." 449 F. Supp., at 651.[19]

But whether or not the legislation was aimed largely at a single employer,[20] it clearly has an extremely narrow focus. It applies only to private employers who have at least 100 employees, at least one of whom works in Minnesota, and who have established voluntary private pension plans, qualified under § 401 of the Internal Revenue Code. And it applies only when such an employer closes his Minnesota office or terminates his pension plan.[21] Thus, this law can

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[19] The Minnesota Supreme Court, *Fleck* v. *Spannaus*, 312 Minn. 223, 251 N. W. 2d 334, engaged in mere speculation as to the state legislature's purpose.

[20] In *Malone* v. *White Motor Corp.*, 435 U. S., at 501 n. 5, the Court noted that the White Motor Corp., an employer of more than 1,000 Minnesota employees, had been prohibited from terminating its pension plan until the expiration date of its collective-bargaining agreement, May 1, 1974. *International Union, UAW* v. *White Motor Corp.*, 505 F. 2d 1193 (CA8). On April 9, 1974, the Minnesota Act was passed, to become effective the following day. When White Motor proceeded to terminate its collectively bargained pension plan at the earliest possible date, May 1, 1974, the State assessed a deficiency of more than $19 million, based upon the Act's 10-year vesting requirement.

[21] Not only did the Act have an extremely narrow aim, but also its effective life was extremely short. The United States House of Representatives had passed a version of the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1001 *et seq.* (1976 ed.), on February 28, 1974, 120 Cong. Rec. 4781–4782 (1974), and the Senate on March 4, 1974, *id.*, at 5011. Both versions expressly pre-empted state laws. That the Minnesota Legislature was aware of the impending federal legislation is reflected in the explicit provision of the Act that it will "become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States." Minn. Stat. § 181B.17. ERISA itself, effective January 1, 1975, expressly pre-empts

hardly be characterized, like the law at issue in the *Blaisdell* case, as one enacted to protect a broad societal interest rather than a narrow class.[22]

Moreover, in at least one other important respect the Act does not resemble the mortgage moratorium legislation whose constitutionality was upheld in the *Blaisdell* case. This legislation, imposing a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees,[23] was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's—conditions of which the Court in *Blaisdell* took judicial notice.[24]

Entering a field it had never before sought to regulate, the Minnesota Legislature grossly distorted the company's existing contractual relationships with its employees by superimposing retroactive obligations upon the company substan-

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all state laws regulating covered plans. 29 U. S. C. § 1144 (a) (1976 ed.). Thus, the Minnesota Act was in force less than nine months, from April 10, 1974, until January 1, 1975. The company argues that the enactment of the law while ERISA was on the horizon totally belies the State's need for this pension legislation.

[22] In upholding the constitutionality of the Act, the District Court referred to Minnesota's interest in protecting the economic welfare of its older citizens, as well as their surrounding economic communities. 449 F. Supp. 644.

[23] Compare the gradual applicability of ERISA, which itself is not even mandatory. At the outset ERISA did not go into effect at all until four months after it was enacted. 29 U. S. C. § 1144 (1976 ed.). Funding and vesting requirements were delayed for an additional year. §§ 1086 (b), 1061 (b)(2) (1976 ed.). By contrast, the Minnesota Act became fully effective the day after its passage. The District Court rejected out of hand the argument that employers were constitutionally entitled to some grace period to adjust their pension planning. 449 F. Supp., at 651.

[24] This is not to suggest that only an emergency of great magnitude can constitutionally justify a state law impairing the obligations of contracts. See, *e. g.*, *Veix* v. *Sixth Ward Building & Loan Assn.*, 310 U. S., at 39–40; *East New York Savings Bank* v. *Hahn*, 326 U. S. 230; *El Paso* v. *Simmons*, 379 U. S. 497.

tially beyond the terms of its employment contracts. And that burden was imposed upon the company only because it closed its office in the State.

This Minnesota law simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. Cf. *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S., at 445. It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State. Cf. *Veix* v. *Sixth Ward Building & Loan Assn.*, 310 U. S. 32, 38.[25] It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively. Cf. *United States Trust Co.* v. *New Jersey*, 431 U. S., at 22. And its narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees.

"Not Blaisdell's case, but Worthen's (*W. B. Worthen Co.* v. *Thomas*, [292 U. S. 426]) supplies the applicable rule" here. *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S., at 63. It is not necessary to hold that the Minnesota law impaired the obligation of the company's employment contracts "without moderation or reason or in a spirit of oppression." *Id.*, at 60.[26] But we do hold that if the Contract Clause means anything at

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[25] See n. 13, *supra*.

[26] As Mr. Justice Cardozo's opinion for the Court in the *Kavanaugh* case made clear, these criteria are "the outermost limits only." The opinion went on to stress the state law's "studied indifference to the interests" of creditors. 295 U. S., at 60.

all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case.

The judgment of the District Court is reversed.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

In cases involving state legislation affecting private contracts, this Court's decisions over the past half century, consistently with both the constitutional text and its original understanding, have interpreted the Contract Clause as prohibiting state legislative Acts which, "[w]ith studied indifference to the interests of the [contracting party] or to his appropriate protection," effectively diminished or nullified the obligation due him under the terms of a contract. *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 60 (1935). But the Contract Clause has not, during this period, been applied to state legislation that, while creating new duties, in nowise diminished the efficacy of any contractual obligation owed the constitutional claimant. Cf. *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962). The constitutionality of such legislation has, rather, been determined solely by reference to other provisions of the Constitution, *e. g.*, the Due Process Clause, insofar as they operate to protect existing economic values.

Today's decision greatly expands the reach of the Clause. The Minnesota Private Pension Benefits Protection Act (Act) does not abrogate or dilute any obligation due a party to a private contract; rather, like all positive social legislation, the Act imposes new, additional obligations on a particular class of persons. In my view, any constitutional infirmity in the law must therefore derive, not from the Contract Clause, but from the Due Process Clause of the Fourteenth Amendment.

I perceive nothing in the Act that works a denial of due process and therefore I dissent.

I

I begin with an assessment of the operation and effect of the Minnesota statute. Although the Court disclaims knowledge of the purposes of the law, both the terms of the Act and the opinion of the State Supreme Court disclose that it was designed to remedy a serious social problem arising from the operation of private pension plans. As the Minnesota Supreme Court indicated, see *Fleck* v. *Spannaus*, 312 Minn. 223, 231, 251 N. W. 2d 334, 338 (1977), the impetus for the law must have been a legislative belief—shared by Congress, see generally Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.* (1976 ed.)—that private pension plans often were grossly unfair to covered employees. Not only would employers often neglect to furnish their employees with adequate information concerning their rights under the plans, leading to erroneous expectations, but also because employers often failed to make contributions to the pension funds large enough adequately to fund their plans, employees often ultimately received only a small amount of those benefits they reasonably anticipated. See *Fleck* v. *Spannaus, supra,* at 231, 251 N. W. 2d, at 338. Acting against this background, Minnesota, prior to the enactment of ERISA, adopted the Act to remedy, *inter alia,* what was viewed as a related serious social problem: the frustration of expectation interests that can occur when an employer closes a single plant and terminates the employees who work there.[1]

Pension plans normally do not make provision to protect

[1] Since appellant's plan remains in force at its other plants, this case does not involve a termination of a pension plan, and I will therefore not discuss the aspect of the statute that involves such contingencies except to observe that it, too, is a sensitive attempt to protect employees' expectation interests.

the interests of employees—even those within only a few months of the "vesting" of their rights under the plan—who are terminated because an employer closes one of his plants. See generally Bernstein, Employee Pension Rights When Plants Shut Down: Problems and Some Proposals, 76 Harv. L. Rev. 952 (1963). Even assuming—contrary to common experience—that an employer adequately informs his employees that a termination for any reason prior to vesting will result in forfeiture of accrued pension credits, denial of all pension benefits not because of job-related failings, but only because the employees are unfortunate enough to be employed at a plant that closes for purely economic reasons, is harsh indeed. For unlike discharges for inadequate job performance, which may reasonably be foreseen, the closing of a plant is a contingency outside the range of normal expectations of both the employer and the employee—as is made clear by the fact that Allied did not rely upon the possibility of a plant's closing in calculating the amount of its contributions to its pension plan fund.[2]

The Minnesota Act addresses this problem by selecting a period—10 years of employment—after which this generally unforeseen contingency may not be the basis for depriving employees of their accumulated pension fund credits, and by establishing a mechanism to provide the employees with the equivalent of the earned pension plan credits. Although the Court glides over this fact, it should be apparent that the Act will impose only minor economic burdens on employers whose pension plans have been adequately funded. For, where, as was true here and as will generally be true, the possibility of a plant's closing was not relied upon by actuaries in calculating the amount of the employer's contributions to the plan, an

[2] All parties to this case agree that Allied's actuarial assumptions in calculating its annual contributions to the pension plan did not include the possibility of a plant's closing.

adequate pension plan fund would include contributions on behalf of terminated employees of 10 or more years' service whose rights had not vested. Indeed, without the Act, the closing of the plant would create a windfall for the employer, because, due to the resulting surplus in the fund, his future contributions would be reduced. In denying the windfall, the Act requires that the employer use the money he will save in the future to purchase annuities for the terminated employees.[3] Of course, the consequence for the employer may be a slightly higher pension expense; the greater outlay might arise, in part, because the past contributions to the plan would have reflected the actuarial possibility that some of the employees who had served 10 years might not ultimately satisfy the plan's vesting requirement.

I emphasize, contrary to the repeated protestations of the Court, that the Act does not impose "sudden and unanticipated" burdens. The features of the Act involved in this case come into play only when an employer, after the effective date of the Act, closes a plant. The existence of the Act's duties—which are similar to a legislatively imposed requirement of

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[3] Because appellant's pension plan was, at the time of the plant closing, underfunded by in excess of $295,000, appellant's pension-funding charge—which the parties stipulate will be between $114,000 and $195,000—will not in fact be offset by future out-of-pocket savings. But this is incidental. What is critical is that appellant, like all covered employers, will be forced to assume an economic burden only a little greater than that inherent in its original undertaking to set up a pension plan for the benefit of its employees.

Although the Court refers to the fact that, under the terms of the plan, no sanctions could be imposed on appellant for not adequately funding it, no substantial objection can be levied against the Act to the extent that it mandates funding sufficient to meet the employer's original undertaking. The plan in the present case can be interpreted as imposing a duty on the employer to fund it adequately, see App. to Brief for Appellant 10a (§ 10 of the plan), and the employees here surely would have understood it as imposing that requirement. There can be no serious objection to a measure that makes such a promise enforceable.

severance pay measured by the length of the discharged employees' service—is simply one of a number of factors that the employer considers in making the business decision whether to close a plant and terminate the employees who work there. In no sense, therefore, are the Act's requirements unanticipated. While the extent of the employer's obligation depends on pre-enactment conduct, the requirements are triggered solely by the closing of a plant subsequent to enactment.[4]

II

The primary question in this case is whether the Contract Clause is violated by state legislation enacted to protect employees covered by a pension plan by requiring an employer to make outlays—which, although not in this case, will largely be offset against future savings—to provide terminated employees with the equivalent of benefits reasonably to be expected under the plan. The Act does not relieve either the employer or his employees of any existing contract obligation. Rather, the Act simply creates an additional, supplemental duty of the employer, no different in kind from myriad duties created by a wide variety of legislative measures which defeat settled expectations but which have nonetheless been sustained by this Court. See, *e. g.*, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976); *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915). For this reason, the Minnesota Act, in my view, does not implicate the Contract Clause in any way. The basic fallacy of today's decision is its mistaken view that the Contract Clause protects all contract-based expectations, including that of an employer that his obligations to his employees will not be legislatively enlarged beyond those explicitly provided in his pension plan.

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[4] Although appellant here apparently decided to close its Minnesota plant prior to the Act's effective date, appellant had every opportunity to reconsider that decision after the Act was adopted and presumably reached its final decision after weighing the possible liabilities under the Act.

A

Historically, it is crystal clear that the Contract Clause was not intended to embody a broad constitutional policy of protecting all reliance interests grounded in private contracts. It was made part of the Constitution to remedy a particular social evil—the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts—and thus was intended to prohibit States from adopting "as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them," *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 439 (1934). But the Framers never contemplated that the Clause would limit the legislative power of States to enact laws creating duties that might burden some individuals in order to benefit others.

The widespread dissatisfaction with the Articles of Confederation and, thus, the adoption of our Constitution, was largely a result of the mass of legislation enacted by various States during our earlier national period to relieve debtors from the obligation to perform contracts with their creditors. The economic depression that followed the Revolutionary War witnessed "an ignoble array of [such state] legislative schemes." *Id.*, at 427. Perhaps the most common of these were laws providing for the emission of paper currency, making it legal tender for the payment of debts. In addition, there were "installment laws," authorizing the payment of overdue obligations in several installments over a period of months or even years, rather than in a single lump sum as provided for in a contract; "stay laws," statutes staying or postponing the payment of private debts or temporarily closing the courts; and "commodity payment laws," permitting payments in certain enumerated commodities at a proportion, often three-fourths or four-fifths, of actual value. See *id.*, at 454–459 (Sutherland, J., dissenting); *Sturges* v. *Crowninshield*, 4 Wheat. 122, 204 (1819); see also B. Wright, The Contract Clause of the

Constitution 4 (1938); Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 512–513 (1944).

Thus, the several provisions of Art. I, § 10, of the Constitution—"No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; [or] pass any . . . Law impairing the Obligation of Contracts . . . ."—were targeted directly at this wide variety of debtor relief measures. Although the debates in the Constitutional Convention and the subsequent public discussion of the Constitution are not particularly enlightening in determining the scope of the Clause, they support the view that the sole evil at which the Contract Clause was directed was the theretofore rampant state legislative interference with the ability of creditors to obtain the payment or security provided for by contract. The Framers regarded the Contract Clause as simply an adjunct to the currency provisions of Art. I, § 10, which operated primarily to bar legislation depriving creditors of the payment of the full value of their loans. See Wright, *supra*, at 5–16. The Clause was thus intended by the Framers to be applicable only to laws which altered the obligations of contracts by effectively relieving one party of the obligation to perform a contract duty.[5]

B

The terms of the Contract Clause negate any basis for its interpretation as protecting all contract-based expectations from unjustifiable interference. It applies, as confirmed by consistent judicial interpretations, only to *state legislative* Acts. See generally *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444 (1924). Its inapplicability to impairments by state judicial acts or by national legislation belies interpretation of the Clause as

[5] Of course, as our recent decisions make plain, the applicability of the Clause has not been confined to classic "debtor relief" laws, but has been regarded as implicated by any measure which dilutes or nullifies a duty created by a contract. See, *e. g.*, *El Paso* v. *Simmons*, 379 U. S. 497 (1965).

intended broadly to make all contract expectations inviolable. Rather, the only possible interpretation of its terms, especially in view of its history, is as a limited prohibition directed at a particular, narrow social evil, likely to occur only through state legislative action. This evil is identified with admirable precision: "Law[s] *impairing* the Obligation of Contracts." (Emphasis supplied.) It is nothing less than an abuse of the English language to interpret, as does the Court, the term "impairing" as including laws which create new duties. While such laws may be conceptualized as "enlarging" the obligation of a contract when they add to the burdens that had previously been imposed by a private agreement, such laws cannot be prohibited by the Clause because they do not dilute or nullify a duty a person had previously obligated himself to perform.

Early judicial interpretations of the Clause explicitly rejected the argument that the Clause applies to state legislative enactments that enlarge the obligations of contracts. *Satterlee* v. *Matthewson*, 2 Pet. 380 (1829), is the leading case. There, this Court rejected a claim that a state legislative Act which gave validity to a contract which the state court had held, before the enactment of the statute, to be invalid at common law could be said to have "impaired the obligation of a contract." It reasoned that "all would admit the retrospective character of [the particular state] enactment, and that the effect of it was to create a contract between parties where none had previously existed. But it surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing." *Id.*, at 412–413.[6] Since *creating* an obligation where none had existed previously is not an *impairment* of contract, it of course should follow necessarily that

[6] *Satterlee*, which was written by Mr. Justice Washington, necessarily rejected the contrary dictum of *Green* v. *Biddle*, 8 Wheat. 1, 84 (1823), another of Mr. Justice Washington's Court opinions.

legislation increasing the obligation of an existing contract is not an impairment.[7] See Hale, *supra*, at 514–516.

C

The Court seems to attempt to justify its distortion of the meaning of the Contract Clause on the ground that imposing new duties on one party to a contract can upset his contract-based expectations as much as can laws that effectively relieve the other party of any duty to perform. But it is no more anomalous to give effect to the term "impairment" and deny a claimant protection under the Contract Clause when new duties are created than it is to give effect to the Clause's inapplicability to acts of the National Government and deny a Contract Clause remedy when an Act of Congress denies a creditor the ability to enforce a contract right to payment. Both results are simply consequences of the fact that the Clause does not protect all contract-based expectations.

More fundamentally, the Court's distortion of the meaning of the Contract Clause creates anomalies of its own and threatens to undermine the jurisprudence of property rights developed over the last 40 years. The Contract Clause, of course, is but one of several clauses in the Constitution that protect existing economic values from governmental interference. The Fifth Amendment's command that "private property [shall not] be taken for public use, without just

[7] In *Georgia R. & Power Co.* v. *Decatur*, 262 U. S. 432 (1923), *Detroit United R. Co.* v. *Michigan*, 242 U. S. 238 (1916), and in dictum in other cases, see *ante*, at 244–245, n. 16, this Court embraced, without any careful analysis and without giving any consideration to *Satterlee* v. *Matthewson*, 2 Pet. 380 (1829), the contrary view that the impairment of a contract may consist in "adding to its burdens" as well as in diminishing its efficacy. *Georgia R. & Power Co.* v. *Decatur*, *supra*, at 439. These opinions reflect the then-prevailing philosophy of economic due process which has since been repudiated. See *Ferguson* v. *Skrupa*, 372 U. S. 726 (1936). In my view, the reasoning of *Georgia R. & Power Co.* and *Detroit United R. Co.* is simply wrong.

compensation" is such a clause. A second is the Due Process Clause, which during the heyday of substantive due process, see *Lochner* v. *New York*, 198 U. S. 45 (1905), largely supplanted the Contract Clause in importance and operated as a potent limitation on government's ability to interfere with economic expectations. See G. Gunther, Cases and Materials on Constitutional Law 603–604 (9th ed. 1975); Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. 852, 890–891 (1944). Decisions over the past 50 years have developed a coherent, unified interpretation of all the constitutional provisions that may protect economic expectations and these decisions have recognized a broad latitude in States to effect even severe interference with existing economic values when reasonably necessary to promote the general welfare. See *Penn Central Transp. Co.* v. *New York City*, *ante*, p. 104; *Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369 (1974); *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962); *Sproles* v. *Binford*, 286 U. S. 374 (1932); *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926). At the same time the prohibition of the Contract Clause, consistently with its wording and historic purposes, has been limited in application to state laws that diluted, with utter indifference to the legitimate interests of the beneficiary of a contract duty, the existing contract obligation, *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935); see *United States Trust Co.* v. *New Jersey*, 431 U. S. 1 (1977); cf. *El Paso* v. *Simmons*, 379 U. S. 497 (1965); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934).

Today's conversion of the Contract Clause into a limitation on the power of States to enact laws that impose duties additional to obligations assumed under private contracts must inevitably produce results difficult to square with any rational conception of a constitutional order. Under the Court's opinion, any law that may be characterized as "superimposing" new obligations on those provided for by contract is to be

regarded as creating "sudden, substantial, and unanticipated burdens" and then to be subjected to the most exacting scrutiny. The validity of such a law will turn upon whether judges see it as a law that deals with a generalized social problem, whether it is temporary (as few will be) or permanent, whether it operates in an area previously subject to regulation, and, finally, whether its duties apply to a broad class of persons. See *ante*, at 249–250. The necessary consequence of the extreme malleability of these rather vague criteria is to vest judges with broad subjective discretion to protect property interests that happen to appeal to them.[8]

To permit this level of scrutiny of laws that interfere with contract-based expectations is an anomaly. There is nothing sacrosanct about expectations rooted in contract that justify according them a constitutional immunity denied other property rights. Laws that interfere with settled expectations created by state property law (and which impose severe economic burdens) are uniformly held constitutional where reasonably related to the promotion of the general welfare. *Hadacheck* v. *Sebastian*, 239 U. S. 394 (1915) is illustrative. There a property owner had established on a particular parcel

[8] With respect, the Court's application of these criteria illustrates this point. First, I find it difficult to understand how the Court can assert that the Act's attempt to protect the expectation interests of employees to pension plans does not deal with a "broad, generalized . . . social problem" but that the mortgage moratorium in *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934), did. The Court's suggestion that the Act has a "narrow aim" because it applies only to pension plans overlooks that it is the existence of the pension plan that creates the need for this legislation. Second, the assertion that Minnesota here "invaded an area never before subject to regulation" takes an exceedingly restrictive view of the subject matter of the Act. If it is regarded not as a private pension plan, but rather as the compensation afforded employees by large employers, then the statute operates in an area that has been extensively regulated. The only explanation for the Court's decision is that it subjectively values the interests of employers in pension plans more highly than it does the legitimate expectation interests of employees.

of land a perfectly lawful business of a brickyard, and, in reliance on the existing law, continued to operate that business for a number of years. However, a local ordinance was passed prohibiting the operation of brickyards in the particular locale and diminishing the value of the claimant's parcel and thus of his investment by nearly 90%. Notwithstanding the effect of the ordinance on the value of the investment, the ordinance was sustained against a taking claim. See also *Miller* v. *Schoene*, 276 U. S. 272 (1928) (statute required cutting down ornamental red cedar trees because they had cedar rust which would be harmful to apple trees in the vicinity).

There is no logical or rational basis for sustaining the duties created by the laws in *Miller* and *Hadacheck*, but invalidating the duty created by the Minnesota Act. Surely, the Act effects no greater interference with reasonable reliance interests than did these other laws. Moreover, the laws operate identically: They all create duties that burden one class of persons and benefit another. The only difference between the present case and *Hadacheck* or *Miller* is that here there was a prior contractual relationship between the members of the benefited and burdened classes. I simply cannot accept that this difference should possess constitutional significance. The only means of avoiding this anomaly is to construe the Contract Clause consistently with its terms and the original understanding and hold it is inapplicable to laws which create new duties.

III

But my view that the Contract Clause has no applicability whatsoever to the Minnesota Act does not end the inquiry in this case. The Due Process Clause of the Fourteenth Amendment limits a State's power to enact such laws and I therefore address that related challenge to the Act's validity.[9] I think that any claim based on due process has no merit.

[9] I recognize that the only question presented by appellant is whether the Minnesota Act violates the Contract Clause. See Jurisdictional State-

My conclusion rests to a considerable extent upon *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976). That case involved a federal statute that required the operators of coal mines to compensate employees who had contracted pneumoconiosis even though the employees had terminated their work in the coal-mining industry before the Act was passed. This federal statute imposed a new duty on operators based on past acts and applied even though the coal mine operators might not have known of the danger that their employees would contract pneumoconiosis at the time of the particular employees' service. *Id.*, at 17; see also *id.*, at 40 n. 4 (POWELL, J., concurring in part). While indicating that the Due Process Clause may place greater limitations on the Government's power to legislate retrospectively than it does on the Government's ability to act prospectively, the statute was upheld on the ground that Congress had broad discretion to deal with the serious social problem of pneumoconiosis affecting former miners and that it was "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Id.*, at 18.

A similar analysis is appropriate here. The Act is an attempt to remedy a serious social problem: the utter frustration of an employee's expectations that can occur when he is terminated because his employer closes down his place of work. The burden on his employer is surely far less harsh than that saddled upon coal operators by the federal statute. Too, a large part of the employer's outlay that the Act requires will be offset against future savings. To this extent, the Act merely

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ment 2. However, I think that a due process claim is fairly subsumed by the question presented and, under the circumstances, elementary fairness requires that I address the due process claim. This reasoning does not apply to the other possible challenges to the Act—*e. g.*, ones based on the "Taking" Clause or on the Commerce Clause—for these others involve rather different considerations from those involved in the Contract and Due Process Clause analyses.

prevents the employer from obtaining a windfall, an effect which would immunize this aspect of the statutory requirement from attack even under the more stringent standards the Court reads into the Contract Clause. See *El Paso* v. *Simmons*, 379 U. S., at 515 and cases cited. To the extent the Act does more than prevent a windfall, it is simply implementing a reasonable legislative judgment that the expectation interests of employees of more than 10 years' service in the receipt of a pension but who, as an actuarial matter, would not satisfy the vesting requirements of the pension plan, should not be frustrated by the generally unforeseen contingency of a plant's closing.

Significantly, also, the Minnesota Act, unlike the federal statute upheld in *Turner Elkhorn Mining*, is not wholly retrospective in its operation. The Act requires an outlay from an employer like appellant only if after the enactment date of the Act (thus when it may give full consideration to the economic consequences of its decision) the employer decides to close its plant.

Nor, finally, do I believe it relevant that the Act is limited in coverage to large employers. "In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 519–520 (1937).

In sum, in my view, the Contract Clause has no applicability whatsoever to the Act, and because I conclude the Act is consistent with the only relevant constitutional restriction—the Due Process Clause—I would affirm the judgment of the District Court.

Syllabus

REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* BAKKE

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 76–811. Argued October 12, 1977—Decided June 28, 1978

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering class of 100 students—the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be "disadvantaged," he would be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority

students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected since no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than respondent's. After his second rejection, respondent filed this action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, *inter alia*, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Petitioner cross-claimed for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that petitioner could not take race into account in making admissions decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds the court held that petitioner's special admissions program violated the Equal Protection Clause. Since petitioner could not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis.

Held: The judgment below is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions pro-

gram, but is reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions.

18 Cal. 3d 34, 553 P. 2d 1152, affirmed in part and reversed in part.

MR. JUSTICE POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 281–287.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause. Pp. 287–320.

3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted. P. 320.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 328–355.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions. Pp. 355–379.

MR. JUSTICE STEVENS, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 408–421.

POWELL, J., announced the Court's judgment and filed an opinion expressing his views of the case, in Parts I, III–A, and V–C of which WHITE, J., joined; and in Parts I and V–C of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, WHITE, MARSHALL, and BLACK-

MUN, JJ., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 324. WHITE, J., *post*, p. 379, MARSHALL, J., *post*, p. 387, and BLACKMUN, J., *post*, p. 402, filed separate opinions. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 408.

Archibald Cox argued the cause for petitioner. With him on the briefs were *Paul J. Mishkin, Jack B. Owens*, and *Donald L. Reidhaar*.

Reynold H. Colvin argued the cause and filed briefs for respondent.

Solicitor General McCree argued the cause for the United States as *amicus curiae*. With him on the briefs were *Attorney General Bell, Assistant Attorney General Days, Deputy Solicitor General Wallace, Brian K. Landsberg, Jessica Dunsay Silver, Miriam R. Eisenstein*, and *Vincent F. O'Rourke*.*

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*Briefs of *amici curiae* urging reversal were filed by *Slade Gorton*, Attorney General, and *James B. Wilson*, Senior Assistant Attorney General, for the State of Washington et al.; by *E. Richard Larson, Joel M. Gora, Charles C. Marson, Sanford Jay Rosen, Fred Okrand, Norman Dorsen, Ruth Bader Ginsburg*, and *Frank Askin* for the American Civil Liberties Union et al.; by *Edgar S. Cahn, Jean Camper Cahn*, and *Robert S. Catz* for the Antioch School of Law; by *William Jack Chow* for the Asian American Bar Assn. of the Greater Bay Area; by *A. Kenneth Pye, Robert B. McKay, David E. Feller*, and *Ernest Gellhorn* for the Association of American Law Schools; by *John Holt Myers* for the Association of American Medical Colleges; by *Jerome B. Falk* and *Peter Roos* for the Bar Assn. of San Francisco et al.; by *Ephraim Margolin* for the Black Law Students Assn. at the University of California, Berkeley School of Law; by *John T. Baker* for the Black Law Students Union of Yale University Law School; by *Annamay T. Sheppard* and *Jonathan M. Hyman* for the Board of Governors of Rutgers, State University of New Jersey, et al.; by *Robert J. Willey* for the Cleveland State University Chapter of the Black American Law Students Assn.; by *John Mason Harding, Albert J. Rosenthal, Daniel Steiner, Iris Brest, James V. Siena, Louis H. Pollak*, and *Michael I. Sovern* for Columbia University et al.; by *Herbert O. Reid* for Howard University; by *Harry B. Reese* and *L. Orin Slagle* for the Law School Admission Council; by *Albert E. Jenner, Jr., Stephen J. Pollak, Burke Marshall,*

MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admis-

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Norman Redlich, Robert A. Murphy, and *William E. Caldwell* for the Lawyers' Committee for Civil Rights Under Law; by *Alice Daniel* and *James E. Coleman, Jr.,* for the Legal Services Corp.; by *Nathaniel R. Jones, Nathaniel S. Colley,* and *Stanley Goodman* for the National Assn. for the Advancement of Colored People; by *Jack Greenberg, James M. Nabrit III, Charles S. Ralston, Eric Schnapper,* and *David E. Kendall* for the NAACP Legal Defense and Educational Fund, Inc.; by *Stephen V. Bomse* for the National Assn. of Minority Contractors et al.; by *Richard B. Sobol, Marian Wright Edelman, Stephen P. Berzon,* and *Joseph L. Rauh, Jr.,* for the National Council of Churches of Christ in the United States et al.; by *Barbara A. Morris, Joan Bertin Lowy,* and *Diana H. Greene* for the National Employment Law Project, Inc.; by *Herbert O. Reid* and *J. Clay Smith, Jr.,* for the National Medical Assn., Inc., et al.; by *Robert Hermann* for the Puerto Rican Legal Defense and Education Fund et al.; by *Robert Allen Sedler, Howard Lesnick,* and *Arval A. Morris* for the Society of American Law Teachers; for the American Medical Student Assn.; and for the Council on Legal Education Opportunity.

Briefs of *amici curiae* urging affirmance were filed by *Lawrence A. Poltrock* and *Wayne B. Giampietro* for the American Federation of Teachers; by *Abraham S. Goldstein, Nathan Z. Dershowitz, Arthur J. Gajarsa, Thaddeus L. Kowalski, Anthony J. Fornelli, Howard L. Greenberger, Samuel Rabinove, Themis N. Anastos, Julian E. Kulas,* and *Alan M. Dershowitz* for the American Jewish Committee et al.; by *McNeill Stokes* and *Ira J. Smotherman, Jr.,* for the American Subcontractors Assn.; by *Philip B. Kurland, Daniel D. Polsby, Larry M. Lavinsky, Arnold Forster, Dennis Rapps, Anthony J. Fornelli, Leonard Greenwald,* and *David I. Ashe* for the Anti-Defamation League of B'nai B'rith et al.; by *Charles G. Bakaly* and *Lawrence B. Kraus* for the Chamber of Commerce of the United States; by *Roger A. Clark, Jerome K. Tankel,* and *Glen R. Murphy* for the Fraternal Order of Police et al.; by *Judith R. Cohn* for the Order Sons of Italy in America; by *Ronald A. Zumbrun, John H. Findley,* and *William F. Harvey* for the Pacific Legal Foundation; by *Benjamin Vinar* and *David I. Caplan* for the Queens Jewish Community Council et al.; and by *Jennings P. Felix* for Young Americans for Freedom.

Briefs of *amici curiae* were filed by *Matthew W. Finkin* for the American Assn. of University Professors; by *John W. Finley, Jr., Michael*

sion of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any appli-

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Blinick, John Cannon, Leonard J. Theberge, and *Edward H. Dowd* for the Committee on Academic Nondiscrimination and Integrity et al.; by *Kenneth C. McGuiness, Robert E. Williams, Douglas S. McDowell,* and *Ronald M. Green* for the Equal Employment Advisory Council; by *Charles E. Wilson* for the Fair Employment Practice Comm'n of California; by *Mario G. Obledo* for Jerome A. Lackner, Director of the Department of Health of California, et al.; by *Vilma S. Martinez, Peter D. Roos,* and *Ralph Santiago Abascal* for the Mexican American Legal Defense and Educational Fund et al.; by *Eva S. Goodwin* for the National Assn. of Affirmative Action Officers; by *Lennox S. Hinds* for the National Conference of Black Lawyers; by *David Ginsburg* for the National Fund for Minority Engineering Students; by *A. John Wabaunsee, Walter R. Echo-Hawk,* and *Thomas W. Fredericks* for the Native American Law Students of the University of California at Davis et al.; by *Joseph A. Broderick, Calvin Brown, LeMarquis DeJarmon, James E. Ferguson II, Harry E. Groves, John H. Harmon, William A. Marsh, Jr.,* and *James W. Smith* for the North Carolina Assn. of Black Lawyers; by *Leonard F. Walentynowicz* for the Polish American Congress et al.; by *Daniel M. Luevano* and *John E. McDermott* for the UCLA Black Law Students Assn. et al.; by *Henry A. Waxman pro se;* by *Leo Branton, Jr., Ann Fagan Ginger, Sam Rosenwein,* and *Laurence R. Sperber* for Price M. Cobbs, M. D., et al.; by *John S. Nolan* for Ralph J. Galliano; and by *Daniel T. Spitler* for Timothy J. Hoy.

cant.† It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

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†MR. JUSTICE STEVENS views the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. *Post,* at 408–411. It must be remembered, however, that petitioner here cross-complained in the trial court for a declaratory judgment that its special program was constitutional and it lost. The trial court's judgment that the special program was unlawful was affirmed by the California Supreme Court in an opinion which left no doubt that the reason for its holding was petitioner's use of race in consideration of *any candidate's* application. Moreover, in explaining the scope of its holding, the court quite clearly stated that petitioner was prohibited from taking race into account in any way in making admissions decisions:

"In addition, the University may properly as it in fact does, consider other factors in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals. In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate, in view of the dissent's misinterpretation, that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission." 18 Cal. 3d 34, 54–55, 553 P. 2d 1152, 1166 (1976) (footnote omitted).

This explicit statement makes it unreasonable to assume that the reach of the California court's judgment can be limited in the manner suggested by MR. JUSTICE STEVENS.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.

I‡

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical School class.[1] The special program consisted of

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‡MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join Parts I and V–C of this opinion. MR. JUSTICE WHITE also joins Part III–A of this opinion.

[1] Material distributed to applicants for the class entering in 1973 described the special admissions program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force Program unless they are from disadvantaged backgrounds. Our goals are: 1) A short range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and 2) Our long-range goal is to stimulate career interest in health professions among junior high and high school students.

"After receiving all pertinent information selected applicants will receive

a separate admissions system operating in coordination with the regular admissions process.

Under the regular admissions procedure, a candidate could submit his application to the Medical School beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications,[2] the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. *Id.*, at 63. About

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a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee.

"Long-range goals will be approached by meeting with counselors and students of schools with large minority populations, as well as with local youth and adult community groups.

"Applications for financial aid are available only *after* the applicant has been accepted and can only be awarded after registration. Financial aid is available to students in the form of scholarships and loans. In addition to the Regents' Scholarships and President's Scholarship programs, the medical school participates in the Health Professions Scholarship Program, which makes funds available to students who otherwise might not be able to pursue a medical education. Other scholarships and awards are available to students who meet special eligibility qualifications. Medical students are also eligible to participate in the Federally Insured Student Loan Program and the American Medical Association Education and Research Foundation Loan Program.

"Applications for Admission are available from:

"Admissions Office
School of Medicine
University of California
Davis, California 95616"

Record 195. The letter distributed the following year was virtually identical, except that the third paragraph was omitted.

[2] For the 1973 entering class of 100 seats, the Davis Medical School received 2,464 applications. *Id.*, at 117. For the 1974 entering class, 3,737 applications were submitted. *Id.*, at 289.

one out of six applicants was invited for a personal interview. *Ibid.* Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data. *Id.*, at 62. The ratings were added together to arrive at each candidate's "benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis.[3] The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." *Id.*, at 63–64.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. *Id.*, at 163. On the 1973 application form, candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.*, at 65–66, 146, 197, 203–205, 216–218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disad-

[3] That is, applications were considered and acted upon as they were received, so that the process of filling the class took place over a period of months, with later applications being considered against those still on file from earlier in the year. *Id.*, at 64.

vantaged" was ever produced, *id.*, at 163–164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation.[4] Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974.[5] Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, *id.*, at 388, but could reject recommended special candidates for failure to meet course requirements or other specific deficiencies. *Id.*, at 171–172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16. *Id.*, at 164, 166.

From the year of the increase in class size—1971—through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans,

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[4] The chairman normally checked to see if, among other things, the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group. *Id.*, at 65–66.

[5] For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white. *Id.*, at 133–134.

and 37 Asians, for a total of 44 minority students.[6] Although disadvantaged whites applied to the special program in large numbers, see n. 5, *supra*, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years Bakke's application was considered under the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical school." *Id.*, at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. *Id.*, at 69. There were four special admissions slots unfilled at that time, however, for which Bakke was not considered. *Id.*, at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. *Id.*, at 259.

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[6] The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:

	Special Admissions Program				General Admissions				Total
	Blacks	Chicanos	Asians	Total	Blacks	Chicanos	Asians	Total	
1970	5	3	0	8	0	0	4	4	12
1971	4	9	2	15	1	0	8	9	24
1972	5	6	5	16	0	0	11	11	27
1973	6	8	2	16	0	2	13	15	31
1974	6	7	3	16	0	4	5	9	25

Id., at 216–218. Sixteen persons were admitted under the special program in 1974, *ibid.*, but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

Bakke's 1974 application was completed early in the year. *Id.*, at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." *Id.*, at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found Bakke "rather limited in his approach" to the problems of the medical profession and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." *Id.*, at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. *Id.*, at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. *Id.*, at 64. In both years, applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's.[7]

After the second rejection, Bakke filed the instant suit in the Superior Court of California.[8] He sought mandatory, injunctive, and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the

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[7] The following table compares Bakke's science grade point average, overall grade point average, and MCAT scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

Class Entering in 1973

			MCAT (Percentiles)			
	SGPA	OGPA	Verbal	Quantitative	Science	Gen. Infor.
Bakke	3.44	3.46	96	94	97	72
Average of regular admittees	3.51	3.49	81	76	83	69
Average of special admittees	2.62	2.88	46	24	35	33

[*Footnote 7 is continued on p. 278; footnote 8 is on p. 278*]

school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment,[9] Art. I, § 21, of the California Constitution,[10] and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d.[11] The University cross-complained for a declaration that its special admissions program was lawful. The trial

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Class Entering in 1974

			MCAT (Percentiles)			
	SGPA	OGPA	Verbal	Quantitative	Science	Gen. Infor.
Bakke	3.44	3.46	96	94	97	72
Average of regular admittees	3.36	3.29	69	67	82	72
Average of special admittees	2.42	2.62	34	30	37	18

Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the special rating system apparently gave credit for overcoming "disadvantage." *Id.*, at 181, 388.

[8] Prior to the actual filing of the suit, Bakke discussed his intentions with Peter C. Storandt, Assistant to the Dean of Admissions at the Davis Medical School. *Id.*, at 259–269. Storandt expressed sympathy for Bakke's position and offered advice on litigation strategy. Several *amici* imply that these discussions render Bakke's suit "collusive." There is no indication, however, that Storandt's views were those of the Medical School or that anyone else at the school even was aware of Storandt's correspondence and conversations with Bakke. Storandt is no longer with the University.

[9] "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

[10] "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

This section was recently repealed and its provisions added to Art. I, § 7, of the State Constitution.

[11] Section 601 of Title VI, 78 Stat. 252, provides as follows:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

court found that the special program operated as a racial quota, because minority applicants in the special program were rated only against one another, Record 388, and 16 places in the class of 100 were reserved for them. *Id.*, at 295–296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." 18 Cal. 3d 34, 39, 553 P. 2d 1152, 1156 (1976). The California court accepted the findings of the trial court with respect to the University's program.[12] Because the special admissions program involved a .racial classification, the Supreme Court held itself bound to apply strict scrutiny. *Id.*, at 49, 553 P. 2d, at 1162–1163. It then turned to the goals the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, *id.*, at 53, 553 P. 2d, at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or the federal statutory grounds cited in the trial court's judgment, the California court held

[12] Indeed, the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process. 18 Cal. 3d, at 44, 553 P. 2d, at 1159.

that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." *Id.*, at 55, 553 P. 2d, at 1166.

Turning to Bakke's appeal, the court ruled that since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program.[13] *Id.*, at 63–64, 553 P. 2d, at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e–17 (1970 ed., Supp. V), see, *e. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 772 (1976). 18 Cal. 3d, at 63–64, 553 P. 2d, at 1172. On this basis, the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. App. A to Application for Stay 48. In its petition for rehearing below, however, the University conceded its inability to carry that burden. App. B to Application for Stay A19–A20.[14] The

[13] Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.

[14] Several *amici* suggest that Bakke lacks standing, arguing that he never showed that his injury—exclusion from the Medical School—will be redressed by a favorable decision, and that the petitioner "fabricated" jurisdiction by conceding its inability to meet its burden of proof. Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected. First, there appears to be no reason to question the petitioner's concession. It was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record. Cf. *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281 (1917).

Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he

California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. 18 Cal. 3d, at 64, 553 P. 2d, at 1172. That order was stayed pending review in this Court. 429 U. S. 953 (1976). We granted certiorari to consider the important constitutional issue. 429 U. S. 1090 (1977).

II

In this Court the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue. 434 U. S. 900 (1977).

A

At the outset we face the question whether a right of action for private parties exists under Title VI. Respondent argues that there is a private right of action, invoking the test set forth in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975). He contends

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lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.

Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant. Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. White disadvantaged students were never considered under the special program, and the University acknowledges that its goal in devising the program was to increase minority enrollment.

that the statute creates a federal right in his favor, that legislative history reveals an intent to permit private actions,[15] that such actions would further the remedial purposes of the statute, and that enforcement of federal rights under the Civil Rights Act generally is not relegated to the States. In addition, he cites several lower court decisions which have recognized or assumed the existence of a private right of action.[16] Petitioner denies the existence of a private right of action, arguing that the sole function of § 601, see n. 11, *supra*, was to establish a predicate for administrative action under § 602, 78 Stat. 252, 42 U. S. C. § 2000d–1.[17] In its view, administrative curtailment of federal funds under that section was the only sanction to be imposed upon recipients that

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[15] See, *e. g.*, 110 Cong. Rec. 5255 (1964) (remarks of Sen. Case).

[16] *E. g.*, *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847, 851–852 (CA5), cert. denied, 388 U. S. 911 (1967); *Natonabah* v. *Board of Education*, 355 F. Supp. 716, 724 (NM 1973); cf. *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277, 1284–1287 (CA7 1977) (Title V of Rehabilitation Act of 1973, 29 U. S. C. § 790 *et seq.* (1976 ed.)); *Piascik* v. *Cleveland Museum of Art*, 426 F. Supp. 779, 780 n. 1 (ND Ohio 1976) (Title IX of Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.* (1976 ed.)).

[17] Section 602, as set forth in 42 U. S. C. § 2000d–1, reads as follows:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be

violated § 601. Petitioner also points out that Title VI contains no explicit grant of a private right of action, in contrast to Titles II, III, IV, and VII, of the same statute, 42 U. S. C. §§ 2000a–3 (a), 2000b–2, 2000c–8, and 2000e–5 (f) (1970 ed. and Supp. V).[18]

We find it unnecessary to resolve this question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this Court has been hesitant to review questions not addressed below. *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434–435 (1940). See also *Massachusetts* v. *Westcott*, 431 U. S. 322 (1977); *Cardinale* v. *Louisiana*, 394 U. S. 437, 439 (1969). Cf. *Singleton* v. *Wulff*, 428 U. S. 106, 121 (1976). We therefore do not address this difficult issue. Similarly, we need not pass

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limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

[18] Several comments in the debates cast doubt on the existence of any intent to create a private right of action. For example, Representative Gill stated that no private right of action was contemplated:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong. Rec. 2467 (1964).

Accord, *id.*, at 7065 (remarks of Sen. Keating); 6562 (remarks of Sen. Kuchel).

upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies. We assume, only for the purposes of this case, that respondent has a right of action under Title VI. See *Lau* v. *Nichols*, 414 U. S. 563, 571 n. 2 (1974) (STEWART, J., concurring in result).

B

The language of § 601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 10 (1976), quoting *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543–544 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme,[19] without regard to the reach of the Equal Pro-

[19] For example, Senator Humphrey stated as follows:

"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and

tection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements cited in the margin at n. 19, generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs.[20] There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example, Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill:

> "The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food

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fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not." *Id.*, at 6547.

See also *id.*, at 12675 (remarks of Sen. Allott); 6561 (remarks of Sen. Kuchel); 2494, 6047 (remarks of Sen. Pastore). But see *id.*, at 15893 (remarks of Rep. MacGregor); 13821 (remarks of Sen. Saltonstall); 10920 (remarks of Sen. Javits); 5266, 5807 (remarks of Sen. Keating).

[20] See, *e. g.*, *id.*, at 7064–7065 (remarks of Sen. Ribicoff); 7054–7055 (remarks of Sen. Pastore); 6543–6544 (remarks of Sen. Humphrey); 2595 (remarks of Rep. Donohue); 2467–2468 (remarks of Rep. Celler); 1643, 2481–2482 (remarks of Rep. Ryan); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, pp. 24–25 (1963).

> surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, *assure the existing right to equal treatment* in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong. Rec. 1519 (1964) (emphasis added).

Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles.[21]

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.*, at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard: "Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333. Other Senators expressed similar views.[22]

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure,[23] but proponents of the bill merely replied that the meaning of

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[21] See, *e. g.*, 110 Cong. Rec. 2467 (1964) (remarks of Rep. Lindsay). See also *id.*, at 2766 (remarks of Rep. Matsunaga); 2731–2732 (remarks of Rep. Dawson); 2595 (remarks of Rep. Donohue); 1527–1528 (remarks of Rep. Celler).

[22] See, *e. g.*, *id.*, at 12675, 12677 (remarks of Sen. Allott); 7064 (remarks of Sen. Pell); 7057, 7062–7064 (remarks of Sen. Pastore); 5243 (remarks of Sen. Clark).

[23] See, *e. g.*, *id.*, at 6052 (remarks of Sen. Johnston); 5863 (remarks of Sen. Eastland); 5612 (remarks of Sen. Ervin); 5251 (remarks of Sen. Talmadge); 1632 (remarks of Rep. Dowdy); 1619 (remarks of Rep. Abernethy).

"discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

> "As I have said, the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees." *Id.*, at 6553.[24]

In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

III

A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. See, *e. g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950). For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. See, *e. g.*, *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) (Black, Harlan, and STEWART, JJ., concurring); *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been

[24] See also *id.*, at 7057, 13333 (remarks of Sen. Ribicoff); 7057 (remarks of Sen. Pastore); 5606–5607 (remarks of Sen. Javits); 5253, 5863–5864, 13442 (remarks of Sen. Humphrey).

applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "rights established [by the Fourteenth Amendment] are personal rights." *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948).

En route to this crucial battle over the scope of judicial review,[25] the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.[26]

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[25] That issue has generated a considerable amount of scholarly controversy. See, *e. g.*, Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974); Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L. Rev. 559 (1975); Kaplan, Equal Justice in an Unequal World: Equality for the Negro, 61 Nw. U. L. Rev. 363 (1966); Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 955 (1974); O'Neil, Racial Preference and Higher Education: The Larger Context, 60 Va. L. Rev. 925 (1974); Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1; Redish, Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments, 22 UCLA L. Rev. 343 (1974); Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653 (1975); Sedler, Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California, 17 Santa Clara L. Rev. 329 (1977); Seeburger, A Heuristic Argument Against Preferential Admissions, 39 U. Pitt. L. Rev. 285 (1977).

[26] Petitioner defines "quota" as a requirement which must be met but can never be exceeded, regardless of the quality of the minority applicants. Petitioner declares that there is no "floor" under the total number of

This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.[27]

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights," *Shelley* v. *Kraemer, supra,* at 22. Accord, *Missouri ex rel. Gaines* v. *Canada, supra,* at 351; *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151, 161–162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when

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minority students admitted; completely unqualified students will not be admitted simply to meet a "quota." Neither is there a "ceiling," since an unlimited number could be admitted through the general admissions process. On this basis the special admissions program does not meet petitioner's definition of a quota.

The court below found—and petitioner does not deny—that white applicants could not compete for the 16 places reserved solely for the special admissions program. 18 Cal. 3d, at 44, 553 P. 2d, at 1159. Both courts below characterized this as a "quota" system.

[27] Moreover, the University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 264–265 (1977); *Washington* v. *Davis,* 426 U. S. 229, 242 (1976); see *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co., supra,* at 152–153, n. 4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious.[28] See, *e. g., Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 541 (1942); *Carrington* v. *Rash,* 380 U. S. 89, 94–97 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, *e. g., Massachusetts Board of Retirement* v. *Murgia,* 427 U. S. 307, 313 (1976) (age); *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 28 (1973) (wealth); *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people

[28] After *Carolene Products,* the first specific reference in our decisions to the elements of "discreteness and insularity" appears in *Minersville School District* v. *Gobitis,* 310 U. S. 586, 606 (1940) (Stone, J., dissenting). The next does not appear until 1970. *Oregon* v. *Mitchell,* 400 U. S. 112, 295 n. 14 (STEWART, J., concurring in part and dissenting in part). These elements have been relied upon in recognizing a suspect class in only one group of cases, those involving aliens. *E. g., Graham* v. *Richardson,* 403 U. S. 365, 372 (1971).

> whose institutions are founded upon the doctrine of equality." *Hirabayashi,* 320 U. S., at 100.
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> "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Korematsu,* 323 U. S., at 216.

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him." *Slaughter-House Cases,* 16 Wall. 36, 71 (1873). The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." [29] It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, *e. g., Mugler* v. *Kansas,* 123 U. S. 623, 661 (1887); *Allgeyer* v. *Louisiana,* 165 U. S. 578 (1897); *Lochner* v. *New York,* 198 U. S. 45 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, *e. g., Plessy* v. *Ferguson,* 163 U. S. 537 (1896). It was only as the era of substantive due process came to a close, see, *e. g., Nebbia* v. *New*

[29] Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 381 (1949).

York, 291 U. S. 502 (1934); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, see, *e. g.*, *United States* v. *Carolene Products*, 304 U. S. 144 (1938); *Skinner* v. *Oklahoma ex rel. Williamson*, *supra*.

By that time it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities.[30] Each had to struggle [31]—and to some extent struggles still [32]—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups.[33] As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880) (Celtic Irishmen) (dictum); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886) (Chinese); *Truax* v. *Raich*, 239 U. S. 33, 41 (1915) (Austrian resident aliens); *Korematsu*, *supra* (Japanese); *Hernandez* v. *Texas*, 347 U. S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in

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[30] M. Jones, American Immigration 177–246 (1960).

[31] J. Higham, Strangers in the Land (1955); G. Abbott, The Immigrant and the Community (1917); P. Roberts, The New Immigration 66–73, 86–91, 248–261 (1912). See also E. Fenton, Immigrants and Unions: A Case Study 561–562 (1975).

[32] "Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin." 41 CFR § 60–50.1 (b) (1977).

[33] *E. g.*, P. Roberts, *supra* n. 31, at 75; G. Abbott, *supra* n. 31, at 270–271. See generally n. 31, *supra*.

Yick Wo, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U. S., at 369.

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases, supra,* the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U. S. 273, 296 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. See *Runyon* v. *McCrary,* 427 U. S. 160, 192–202 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. See, *e. g.,* Cong. Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); *id.,* at 2891–2892 (remarks of Sen. Conness); *id.,* 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (Fourteenth Amendment "protect[s] classes from class legislation"). See also Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 60–63 (1955).

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of

equal laws," *Yick Wo, supra,* at 369, in a Nation confronting a legacy of slavery and racial discrimination. See, *e. g., Shelley* v. *Kraemer,* 334 U. S. 1 (1948); *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[o]ver the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967), quoting *Hirabayashi,* 320 U. S., at 100.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." [34]

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[34] In the view of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. See, *e. g., post,* at 361, 362. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, MR. JUSTICE BRENNAN, MR. JUSTICE

The clock of our liberties, however, cannot be turned back to 1868. *Brown* v. *Board of Education, supra,* at 492; accord, *Loving* v. *Virginia, supra,* at 9. It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.[35] "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." *Hernandez,* 347 U. S., at 478.

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial toler-

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WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

[35] Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution." A. Bickel, The Morality of Consent 133 (1975).

ance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not.[36] Courts would be asked to evaluate the extent of the prejudice and consequent

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[36] As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See Part V, *infra*. But I disagree with much that is said in their opinion.

They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups by "society at large," *post*, at 369 (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program." *Post*, at 365–366.

The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants—nothing is said about Asians, cf., *e. g.*, *post*, at 374 n. 57—would have made better scores. Not one word in the record supports this conclusion, and the authors of the opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since if it may be concluded *on this record* that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it, in any area of social intercourse. See Part IV–B, *infra*.

harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.[37]

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[37] Mr. Justice Douglas has noted the problems associated with such inquiries:

"The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [Cf. *Plessy* v. *Ferguson*, 163 U. S. 537, 549, 552 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt* v. *Painter*, 339 U. S. 629, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and even-

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. See *United Jewish Organizations* v. *Carey*, 430 U. S., at 172–173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis* v. *Odegaard*, 416 U. S. 312, 343 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate

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handed manner. See, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Terrace* v. *Thompson*, 263 U. S. 197; *Oyama* v. *California*, 332 U. S. 633. This Court has not sustained a racial classification since the wartime cases of *Korematsu* v. *United States*, 323 U. S. 214, and *Hirabayashi* v. *United States*, 320 U. S. 81, involving curfews and relocations imposed upon Japanese-Americans.

"Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints." *DeFunis* v. *Odegaard*, 416 U. S. 312, 337–340 (1974) (dissenting opinion) (footnotes omitted).

racial and ethnic antagonisms rather than alleviate them. *United Jewish Organizations, supra,* at 173–174 (BRENNAN, J., concurring in part). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 650–651 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." A. Cox, The Role of the Supreme Court in American Government 114 (1976).

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu* v. *United States,* 323 U. S. 214 (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process.[38] When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley* v. *Kraemer,* 334 U. S., at 22; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S., at 351.

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[38] R. Dahl, A Preface to Democratic Theory (1956); Posner, *supra* n. 25, at 27.

C

Petitioner contends that on several occasions this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. *E. g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *McDaniel* v. *Barresi*, 402 U. S. 39 (1971); *Green* v. *County School Board*, 391 U. S. 430 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement.[39] Moreover, the scope of the remedies was not permitted to exceed the extent of the

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[39] Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: *Offermann* v. *Nitkowski*, 378 F. 2d 22 (CA2 1967); *Wanner* v. *County School Board*, 357 F. 2d 452 (CA4 1966); *Springfield School Committee* v. *Barksdale*, 348 F. 2d 261 (CA1 1965). Of these, *Wanner* involved a school system held to have been *de jure* segregated and enjoined from maintaining segregation; racial districting was deemed necessary. 357 F. 2d, at 454. Cf. *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977). In *Barksdale* and *Offermann*, courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. See *Keyes* v. *School District No. 1*, 413 U. S. 189, 240–250 (1973) (POWELL, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education.

Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

violations. *E. g., Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977); *Milliken* v. *Bradley*, 418 U. S. 717 (1974); see *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976). See also *Austin Independent School Dist.* v. *United States*, 429 U. S. 990, 991–995 (1976) (POWELL, J., concurring). Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification.

The employment discrimination cases also do not advance petitioner's cause. For example, in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), we approved a retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary "'to make [the victims] whole for injuries suffered on account of unlawful employment discrimination.'" *Id.*, at 763, quoting *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975). The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *E. g., Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F. 2d 1333 (CA2 1973); *Carter* v. *Gallagher*, 452 F. 2d 315 (CA8 1972), modified on rehearing en banc, *id.*, at 327. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. *E. g., Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (CA3), cert. denied, 404 U. S. 854 (1971);[40] *Associated General*

[40] Every decision upholding the requirement of preferential hiring under the authority of Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.), has emphasized the existence of previous discrimination as a predicate for

Contractors of Massachusetts, Inc. v. *Altshuler*, 490 F. 2d 9 (CA1 1973), cert. denied, 416 U. S. 957 (1974); cf. *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966). But we have never approved preferential classifications in the absence of proved constitutional or statutory violations.[41]

Nor is petitioner's view as to the applicable standard supported by the fact that gender-based classifications are not subjected to this level of scrutiny. *E. g., Califano* v. *Webster*, 430 U. S. 313, 316–317 (1977); *Craig* v. *Boren*, 429 U. S. 190, 211 n. (1976) (POWELL, J., concurring). Gender-based distinctions are less likely to create the analytical and prac-

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the imposition of a preferential remedy. *Contractors Association of Eastern Pennsylvania; Southern Illinois Builders Assn.* v. *Ogilvie*, 471 F. 2d 680 (CA7 1972); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (NJ 1970); *Weiner* v. *Cuyahoga Community College District*, 19 Ohio St. 2d 35, 249 N. E. 2d 907, cert. denied, 396 U. S. 1004 (1970). See also *Rosetti Contracting Co.* v. *Brennan*, 508 F. 2d 1039, 1041 (CA7 1975); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F. 2d 9 (CA1 1973), cert. denied, 416 U. S. 957 (1974); *Northeast Constr. Co.* v. *Romney*, 157 U. S. App. D. C. 381, 383, 390, 485 F. 2d 752, 754, 761 (1973).

[41] This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c (1970 ed., Supp. V). In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, *e. g., South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–310 (1966) (§ 5), and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies. See *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 103 (1976).

Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.

tical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. See, *e. g., Califano* v. *Goldfarb,* 430 U. S. 199, 212–217 (1977); *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 645 (1975). The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.

Petitioner also cites *Lau* v. *Nichols,* 414 U. S. 563 (1974), in support of the proposition that discrimination favoring racial or ethnic minorities has received judicial approval without the exacting inquiry ordinarily accorded "suspect" classifications. In *Lau,* we held that the failure of the San Francisco school system to provide remedial English instruction for some 1,800 students of oriental ancestry who spoke no English amounted to a violation of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, and the regulations promulgated thereunder. Those regulations required remedial instruction where inability to understand English excluded children of foreign ancestry from participation in educational programs. 414 U. S., at 568. Because we found that the students in *Lau* were denied "a meaningful opportunity to participate in the educational program," *ibid.,* we remanded for the fashioning of a remedial order.

Lau provides little support for petitioner's argument. The decision rested solely on the statute, which had been construed by the responsible administrative agency to reach educational practices "which have the effect of subjecting individuals to discrimination," *ibid.* We stated: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.*, at 566. Moreover, the "preference" approved did not result in the denial of the relevant benefit—"meaningful opportunity to participate in the educational program"—to anyone else. No other student was deprived by that preference of the ability to participate in San Francisco's school system, and the applicable regulations required similar assistance for all students who suffered similar linguistic deficiencies. *Id.*, at 570–571 (STEWART, J., concurring in result).

In a similar vein,[42] petitioner contends that our recent decision in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977), indicates a willingness to approve racial classifications designed to benefit certain minorities, without denominating the classifications as "suspect." The State of New York had redrawn its reapportionment plan to meet objections of the Department of Justice under § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c (1970 ed., Supp. V). Specifically, voting districts were redrawn to enhance the electoral power

[42] Petitioner also cites our decision in *Morton* v. *Mancari*, 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is *sui generis*. *Id.*, at 554. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion." *Ibid.*

of certain "nonwhite" voters found to have been the victims of unlawful "dilution" under the original reapportionment plan. *United Jewish Organizations,* like *Lau,* properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity—meaningful participation in the electoral process.

In this case, unlike *Lau* and *United Jewish Organizations,* there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit—admission to the Medical School—they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. *E. g., McLaurin* v. *Oklahoma State Regents,* 339 U. S., at 641–642.

IV

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths,* 413 U. S. 717, 721–722 (1973) (footnotes omitted); *Loving* v. *Virginia,* 388 U. S., at 11; *McLaughlin* v. *Florida,* 379 U. S. 184, 196 (1964). The special admissions

program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination;[43] (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

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[43] A number of distinct subgoals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said that preferences for Negro applicants may compensate for harm done them personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, *supra* n. 25, at 581–586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, The Case for Black Reparations (1973). That justification for racial or ethnic preference has been subjected to much criticism. *E. g.*, Greenawalt, *supra* n. 25, at 581; Posner, *supra* n. 25, at 16–17, and n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, *supra* n. 25, at 391. For purposes of analysis these subgoals need not be considered separately.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased prediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

A

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. *E. g., Loving* v. *Virginia, supra,* at 11; *McLaughlin* v. *Florida, supra,* at 196; *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown,* attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, *e. g., Teamsters* v. *United States,* 431 U. S. 324, 367–376 (1977); *United Jewish Organizations,* 430 U. S., at 155–156; *South Carolina* v. *Katzenbach,* 383 U. S. 301, 308 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the

extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations,[44] it cannot be

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[44] MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See *post*, at 363–366, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971):

"*Discriminatory preference* for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of *artificial, arbitrary, and unnecessary barriers* to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*, at 431 (emphasis added).

Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," *ibid.*, or lacks "a manifest relationship to the employment in question," *id.*, at 432. See also *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802–803, 805–806 (1973). Nothing *in this record*—as opposed to some of the general literature cited by MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN—even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in n. 7, *supra*, is without educational justification.

Moreover, the presumption in *Griggs*—that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute—was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination:

"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of

said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.[45] Cf. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88 (1976); n. 41, *supra*. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, *e. g.*, *Califano* v. *Webster*, 430 U. S., at 316–321; *Califano*

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intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, *supra*, at 429–430. See, *e. g.*, H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 26 (1963) ("Testimony supporting the fact of discrimination in employment is overwhelming"). See generally Vaas, Title VII: The Legislative History, 7 B. C. Ind. & Com. L. Rev. 431 (1966). The Court emphasized that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." 401 U. S., at 430–431. Indeed, § 703 (j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U. S. C. § 2000e–2 (j). Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

[45] For example, the University is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n. 37, *supra*.

v. *Goldfarb*, 430 U. S., at 212–217. Lacking this capability, petitioner has not carried its burden of justification on this issue.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.[46] The court below addressed this failure of proof:

> "The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority

[46] The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

communities than the average white doctor. (See Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role* (1975) 42 U. Chi. L. Rev. 653, 688.) Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." 18 Cal. 3d, at 56, 553 P. 2d, at 1167.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.[47]

D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally per-

[47] It is not clear that petitioner's two-track system, even if adopted throughout the country, would substantially increase representation of blacks in the medical profession. That is the finding of a recent study by Sleeth & Mishell, Black Under-Representation in United States Medical Schools, 297 New England J. of Med. 1146 (1977). Those authors maintain that the cause of black underrepresentation lies in the small size of the national pool of qualified black applicants. In their view, this problem is traceable to the poor premedical experiences of black undergraduates, and can be remedied effectively only by developing remedial programs for black students before they enter college.

missible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

> "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy* v. *New Hampshire*, 354 U. S. 234, 263 (1957) (concurring in result).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967):

> "Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment .... The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States* v. *Associated Press*, 52 F. Supp. 362, 372."

The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.[48] As the Court

[48] The president of Princeton University has described some of the benefits derived from a diverse student body:

"[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and

noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt* v. *Painter*, 339 U. S., at 634, the

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backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'

. . . . .

"In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth." Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977).

Court made a similar point with specific reference to legal education:

> "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.[49]

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges—and the courts below have held—that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the

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[49] Graduate admissions decisions, like those at the undergraduate level, are concerned with "assessing the potential contributions to the society of each individual candidate following his or her graduation—contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or government affairs and the keenest critic of all things organized, the solitary scholar and the concerned parent." *Id.*, at 10.

program's racial classification is necessary to promote this interest. *In re Griffiths,* 413 U. S., at 721–722.

V

A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.[50]

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

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[50] See Manning, The Pursuit of Fairness in Admissions to Higher Education, in Carnegie Council on Policy Studies in Higher Education, Selective Admissions in Higher Education 19, 57–59 (1977).

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

> "In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . .
>
> "In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. . . . [See Appendix hereto.]
>
> "In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many

types and categories of students." App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae* 2–3.

In such an admissions program,[51] race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a

[51] The admissions program at Princeton has been described in similar terms:

"While race is not in and of itself a consideration in determining basic qualifications, and while there are obviously significant differences in background and experience among applicants of every race, in some situations race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished—and against what odds. Similarly, such factors as family circumstances and previous educational opportunities may be relevant, either in conjunction with race or ethnic background (with which they may be associated) or on their own." Bowen, *supra* n. 48, at 8–9.

For an illuminating discussion of such flexible admissions systems, see Manning, *supra* n. 50, at 57–59.

particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.[52]

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod* v. *Dilworth*, 322 U. S. 327, 329 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith

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[52] The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. Nowhere in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN is this denial even addressed.

would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See, *e. g.*, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977); *Washington* v. *Davis*, 426 U. S. 229 (1976); *Swain* v. *Alabama*, 380 U. S. 202 (1965).[53]

B

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred

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[53] Universities, like the prosecutor in *Swain*, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

There also are strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. Petitioner's program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[j]ustice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U. S. 11, 14 (1954).

applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S., at 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

C

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI

With respect to respondent's entitlement to an injunction directing his admission to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed.[54]

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[54] There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in Part V, *supra*. Cf. *Mt. Healthy*

APPENDIX TO OPINION OF POWELL, J.

Harvard College Admissions Program [55]

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educa-

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City Board of Ed. v. *Doyle*, 429 U. S. 274, 284–287 (1977). In *Mt. Healthy*, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection—purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 265–266. No one can say how—or even if—petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in *Mt. Healthy*. In sum, a remand would result in fictitious recasting of past conduct.

[55] This statement appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae*.

tional experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq.* (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty—perhaps 150 or so out of an entering class of over 1,100—the Committee seeks—

> variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College]. . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104–105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students,

minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But

that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concurring in the judgment in part and dissenting in part.

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented—whether government may use race-conscious programs to redress the continuing effects of past discrimination—

and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.*, prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Allan Bakke's rights have been violated and that he must, therefore, be admitted to the Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account in university admissions, the particular special admissions program used by petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary to achieve petitioner's stated goals. Accordingly, these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke "is entitled to an order that he be admitted to the University." 18 Cal. 3d 34, 64, 553 P. 2d 1152, 1172 (1976).

We agree with MR. JUSTICE POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself. We also agree that the effect of the California Supreme Court's affirmance of the judgment of the Superior Court of California would be to prohibit the University from establishing in the future affirmative-action programs that take race into account. See *ante*, at 271 n. Since we conclude that the affirmative admissions program at the Davis

Medical School is constitutional, we would reverse the judgment below in all respects. MR. JUSTICE POWELL agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.[1]

I

Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our "American Dilemma." Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the "last resort of constitutional arguments." *Buck* v. *Bell*, 274 U. S. 200, 208 (1927). Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" [2] status before the law, a status

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[1] We also agree with MR. JUSTICE POWELL that a plan like the "Harvard" plan, see *ante*, at 316–318, is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.

[2] See *Plessy* v. *Ferguson*, 163 U. S. 537 (1896).

always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred by our decision in *Brown* v. *Board of Education*, 347 U. S. 483 (*Brown I*), and its progeny,[3] which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution. Even then inequality was not eliminated with "all deliberate speed." *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955). In 1968[4] and again in 1971,[5] for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket[6] and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.

Against this background, claims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds—let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

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[3] *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54 (1958); *Muir* v. *Louisville Park Theatrical Assn.*, 347 U. S. 971 (1954); *Mayor of Baltimore* v. *Dawson*, 350 U. S. 877 (1955); *Holmes* v. *Atlanta*, 350 U. S. 879 (1955); *Gayle* v. *Browder*, 352 U. S. 903 (1956).

[4] See *Green* v. *County School Board*, 391 U. S. 430 (1968).

[5] See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *Davis* v. *School Comm'rs of Mobile County*, 402 U. S. 33 (1971); *North Carolina Board of Education* v. *Swann*, 402 U. S. 43 (1971).

[6] See, *e. g.*, cases collected in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 663 n. 5 (1978).

II

The threshold question we must decide is whether Title VI of the Civil Rights Act of 1964 bars recipients of federal funds from giving preferential consideration to disadvantaged members of racial minorities as part of a program designed to enable such individuals to surmount the obstacles imposed by racial discrimination.[7] We join Parts I and V–C of our Brother POWELL's opinion and three of us agree with his conclusion in Part II that this case does not require us to resolve the question whether there is a private right of action under Title VI.[8]

In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment. The legislative history of Title VI, administrative regulations interpreting the statute, subsequent congressional and executive action, and the prior decisions of this Court compel this conclusion. None of these sources lends support to the proposition that Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life.

A

The history of Title VI—from President Kennedy's request that Congress grant executive departments and agencies au-

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[7] Section 601 of Title VI provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d.

[8] MR. JUSTICE WHITE believes we should address the private-right-of-action issue. Accordingly, he has filed a separate opinion stating his view that there is no private right of action under Title VI. See *post*, p. 379.

thority to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals—reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.

This purpose was first expressed in President Kennedy's June 19, 1963, message to Congress proposing the legislation that subsequently became the Civil Rights Act of 1964.[9]

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[9] "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also . . . .

"Many statutes providing Federal financial assistance, however, define with such precision both the Administrator's role and the conditions upon which specified amounts shall be given to designated recipients that the amount of administrative discretion remaining—which might be used to withhold funds if discrimination were not ended—is at best questionable. No administrator has the unlimited authority to invoke the Constitution in opposition to the mandate of the Congress. Nor would it always be helpful to require unconditionally—as is often proposed—the withdrawal of all Federal funds from programs urgently needed by Negroes as well as whites; for this may only penalize those who least deserve it without ending discrimination.

"Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance—by way of grant, loan, contract, guaranty, insurance, or otherwise—to any program or activity in which racial discrimination occurs. This would not permit the Federal Government to cut off all Federal aid of all kinds as a means of punishing an area for the discrimination occurring therein—but it would clarify the authority

Representative Celler, the Chairman of the House Judiciary Committee, and the floor manager of the legislation in the House, introduced Title VI in words unequivocally expressing the intent to provide the Federal Government with the means of assuring that its funds were not used to subsidize racial discrimination inconsistent with the standards imposed by the Fourteenth and Fifth Amendments upon state and federal action.

> "The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong. Rec. 1519 (1964).

It was clear to Representative Celler that Title VI, apart from the fact that it reached all federally funded activities even in the absence of sufficient state or federal control to invoke the Fourteenth or Fifth Amendments, was not placing new substantive limitations upon the use of racial criteria, but rather was designed to extend to such activities "the existing right to equal treatment" enjoyed by Negroes under those Amendments, and he later specifically defined the purpose of Title VI in this way:

> "In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money

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of any administrator with respect to Federal funds or financial assistance and discriminatory practices." 109 Cong. Rec. 11161 (1963).

> and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.
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> "It is for these reasons that we bring forth title VI. The enactment of title VI will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions." *Id.*, at 2467.

Representative Celler also filed a memorandum setting forth the legal basis for the enactment of Title VI which reiterated the theme of his oral remarks: "In exercising its authority to fix the terms on which Federal funds will be disbursed . . . , Congress clearly has power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution." *Id.*, at 1528.

Other sponsors of the legislation agreed with Representative Celler that the function of Title VI was to end the Federal Government's complicity in conduct, particularly the segregation or exclusion of Negroes, inconsistent with the standards to be found in the antidiscrimination provisions of the Constitution. Representative Lindsay, also a member of the Judiciary Committee, candidly acknowledged, in the course of explaining why Title VI was necessary, that it did not create any new standard of equal treatment beyond that contained in the Constitution:

> "Both the Federal Government and the States are under constitutional mandates not to discriminate. Many have raised the question as to whether legislation is required at all. Does not the Executive already have the power in the distribution of Federal funds to apply those conditions which will enable the Federal Government itself to live up to the mandate of the Constitution and to require

> States and local government entities to live up to the Constitution, most especially the 5th and 14th amendments?" *Id.*, at 2467.

He then explained that legislation was needed to authorize the termination of funding by the Executive Branch because existing legislation seemed to contemplate the expenditure of funds to support racially segregated institutions. *Ibid.* The views of Representatives Celler and Lindsay concerning the purpose and function of Title VI were shared by other sponsors and proponents of the legislation in the House.[10] Nowhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution.

The Senate's consideration of Title VI reveals an identical understanding concerning the purpose and scope of the legislation. Senator Humphrey, the Senate floor manager, opened the Senate debate with a section-by-section analysis of the Civil Rights Act in which he succinctly stated the purpose of Title VI:

> "The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C. A. 4, 1963), [cert. denied, 376 U. S. 938 (1964)]. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply

[10] See, *e. g.*, 110 Cong. Rec. 2732 (1964) (Rep. Dawson); *id.*, at 2481–2482 (Rep. Ryan); *id.*, at 2766 (Rep. Matsunaga); *id.*, at 2595 (Rep. Donahue).

> designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.*, at 6544.

Senator Humphrey, in words echoing statements in the House, explained that legislation was needed to accomplish this objective because it was necessary to eliminate uncertainty concerning the power of federal agencies to terminate financial assistance to programs engaging in racial discrimination in the face of various federal statutes which appeared to authorize grants to racially segregated institutions. *Ibid.* Although Senator Humphrey realized that Title VI reached conduct which, because of insufficient governmental action, might be beyond the reach of the Constitution, it was clear to him that the substantive standard imposed by the statute was that of the Fifth and Fourteenth Amendments.

Senate supporters of Title VI repeatedly expressed agreement with Senator Humphrey's description of the legislation as providing the explicit authority and obligation to apply the standards of the Constitution to all recipients of federal funds. Senator Ribicoff described the limited function of Title VI:

> "Basically, there is a constitutional restriction against discrimination in the use of Federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333.

Other strong proponents of the legislation in the Senate repeatedly expressed their intent to assure that federal funds would only be spent in accordance with constitutional standards. See remarks of Senator Pastore, *id.*, at 7057, 7062; Senator Clark, *id.*, at 5243; Senator Allott, *id.*, at 12675, 12677.[11]

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[11] There is also language in 42 U. S. C. § 2000d–5, enacted in 1966, which supports the conclusion that Title VI's standard is that of the Constitution. Section 2000d–5 provides that "for the purpose of determining

Respondent's contention that Congress intended Title VI to bar affirmative-action programs designed to enable minorities disadvantaged by the effects of discrimination to participate in federally financed programs is also refuted by an examination of the type of conduct which Congress thought it was prohibiting by means of Title VI. The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes. Senator Humphrey set the theme in his speech presenting Title VI to the Senate:

> "Large sums of money are contributed by the United States each year for the construction, operation, and maintenance of segregated schools.
>
> . . . . . .
>
> "Similarly, under the Hill-Burton Act, Federal grants are made to hospitals which admit whites only or Negroes only. . . .
>
> "In higher education also, a substantial part of the Federal grants to colleges, medical schools and so forth, in the South is still going to segregated institutions.

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whether a local educational agency is in compliance with [Title VI], compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with [Title VI], insofar as the matters covered in the order or judgment are concerned." This provision was clearly intended to avoid subjecting local educational agencies simultaneously to the jurisdiction of the federal courts and the federal administrative agencies in connection with the imposition of remedial measures designed to end school segregation. Its inclusion reflects the congressional judgment that the requirements imposed by Title VI are identical to those imposed by the Constitution as interpreted by the federal courts.

> "Nor is this all. In several States, agricultural extension services, supported by Federal funds, maintain racially segregated offices for Negroes and whites. . . .
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> " . . . Vocational training courses, supported with Federal funds, are given in segregated schools and institutions and often limit Negroes to training in less skilled occupations. In particular localities it is reported that Negroes have been cut off from relief rolls, or denied surplus agricultural commodities, or otherwise deprived of the benefit of federally assisted programs, in retaliation for their participation in voter registration drives, sit-in demonstrations and the like." *Id.*, at 6543–6544.

See also the remarks of Senator Pastore (*id.*, at 7054–7055); Senator Ribicoff (*id.*, at 7064–7065); Senator Clark (*id.*, at 5243, 9086); Senator Javits (*id.*, at 6050, 7102).[12]

The conclusion to be drawn from the foregoing is clear. Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support. It was aware that there were many federally funded programs and institutions which discriminated against minorities in a manner inconsistent with the standards of the Fifth and Fourteenth Amendments but whose activities might not involve sufficient state or federal action so as to be in violation of these Amendments. Moreover, Congress believed that it was questionable whether the Executive Branch possessed legal authority to terminate the funding of activities on the ground that they discriminated racially against Negroes in a manner violative of the standards contained in the Fourteenth and Fifth

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[12] As has already been seen, the proponents of Title VI in the House were motivated by the identical concern. See remarks of Representative Celler (110 Cong. Rec. 2467 (1964)); Representative Ryan (*id.*, at 1643, 2481–2482); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, Additional Views of Seven Representatives 24–25 (1963).

Amendments. Congress' solution was to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority and the obligation to terminate its financial support of any activity which employed racial criteria in a manner condemned by the Constitution.

Of course, it might be argued that the Congress which enacted Title VI understood the Constitution to require strict racial neutrality or color blindness, and then enshrined that concept as a rule of statutory law. Later interpretation and clarification of the Constitution to permit remedial use of race would then not dislodge Title VI's prohibition of race-conscious action. But there are three compelling reasons to reject such a hypothesis.

First, no decision of this Court has ever adopted the proposition that the Constitution must be colorblind. See *infra*, at 355–356.

Second, even if it could be argued in 1964 that the Constitution might conceivably require color blindness, Congress surely would not have chosen to codify such a view unless the Constitution clearly required it. The legislative history of Title VI, as well as the statute itself, reveals a desire to induce voluntary compliance with the requirement of nondiscriminatory treatment.[13] See § 602 of the Act, 42 U. S. C. § 2000d–1 (no funds shall be terminated unless and until it has been "determined that compliance cannot be secured by voluntary means"); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 25 (1963); 110 Cong Rec. 13700 (1964) (Sen. Pastore); *id.*, at 6546 (Sen. Humphrey). It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations. Yet a reading of Title VI as prohibiting all action predicated upon race which adversely

[13] See separate opinion of MR. JUSTICE WHITE, *post*, at 382–383, n. 2.

affects any individual would require recipients guilty of discrimination to await the imposition of such remedies by the Executive Branch. Indeed, such an interpretation of Title VI would prevent recipients of federal funds from taking race into account even when necessary to bring their programs into compliance with federal constitutional requirements. This would be a remarkable reading of a statute designed to eliminate constitutional violations, especially in light of judicial decisions holding that under certain circumstances the remedial use of racial criteria is not only permissible but is constitutionally required to eradicate constitutional violations. For example, in *Board of Education* v. *Swann*, 402 U. S. 43 (1971), the Court held that a statute forbidding the assignment of students on the basis of race was unconstitutional because it would hinder the implementation of remedies necessary to accomplish the desegregation of a school system: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.*, at 46. Surely Congress did not intend to prohibit the use of racial criteria when constitutionally required or to terminate the funding of any entity which implemented such a remedy. It clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution rather than requiring the recipient to await a judicial adjudication of unconstitutionality and the judicial imposition of a racially oriented remedy.

Third, the legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine. Although it is clear from the debates that the supporters of Title VI intended to ban uses of race prohibited by the Constitution and, more specifically, the maintenance of segre-

gated facilities, they never precisely defined the term "discrimination," or what constituted an exclusion from participation or a denial of benefits on the ground of race. This failure was not lost upon its opponents. Senator Ervin complained:

> "'The word 'discrimination,' as used in this reference, has no contextual explanation whatever, other than the provision that the discrimination 'is to be against' individuals participating in or benefiting from federally assisted programs and activities on the ground specified. With this context, the discrimination condemned by this reference occurs only when an individual is treated unequally or unfairly because of his race, color, religion, or national origin. What constitutes unequal or unfair treatment? Section 601 and section 602 of title VI do not say. They leave the determination of that question to the executive department or agencies administering each program, without any guideline whatever to point out what is the congressional intent." 110 Cong. Rec. 5612 (1964).

See also remarks of Representative Abernethy (*id.*, at 1619); Representative Dowdy (*id.*, at 1632); Senator Talmadge (*id.*, at 5251); Senator Sparkman (*id.*, at 6052). Despite these criticisms, the legislation's supporters refused to include in the statute or even provide in debate a more explicit definition of what Title VI prohibited.

The explanation for this failure is clear. Specific definitions were undesirable, in the views of the legislation's principal backers, because Title VI's standard was that of the Constitution and one that could and should be administratively and judicially applied. See remarks of Senator Humphrey (*id.*, at 5253, 6553); Senator Ribicoff (*id.*, at 7057, 13333); Senator Pastore (*id.*, at 7057); Senator Javits (*id.*, at 5606–5607, 6050).[14] Indeed, there was a strong emphasis throughout

[14] These remarks also reflect the expectations of Title VI's proponents that the application of the Constitution to the conduct at the core of their

Congress' consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination. Attorney General Robert Kennedy testified that regulations had not been written into the legislation itself because the rules and regulations defining discrimination might differ from one program to another so that the term would assume different meanings in different contexts.[15] This determination to preserve flexibility in the administration of Title VI was shared by the legislation's supporters. When Senator Johnston offered an amendment that would have expressly authorized federal grantees to take race into account in placing children in adoptive and foster homes, Senator Pastore opposed the amendment, which was ultimately defeated by a 56–29 vote, on the ground that federal administrators could be trusted to act reasonably and that there was no danger that they would prohibit the use of racial criteria under such circumstances. *Id.*, at 13695.

Congress' resolve not to incorporate a static definition of discrimination into Title VI is not surprising. In 1963 and 1964, when Title VI was drafted and debated, the courts had only recently applied the Equal Protection Clause to strike down public racial discrimination in America, and the scope of that Clause's nondiscrimination principle was in a state of flux and rapid evolution. Many questions, such as whether the Fourteenth Amendment barred only *de jure* discrimination or in at least some circumstances reached *de facto* discrimination, had not yet received an authoritative judicial resolution. The congressional debate reflects an awareness of the evolu-

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concern—the segregation of Negroes in federally funded programs and their exclusion from the full benefits of such programs—was clear. See *supra*, at 333–336; *infra*, at 340–342, n. 17.

[15] Testimony of Attorney General Kennedy in Hearings before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess., 398–399 (1963).

tionary change that constitutional law in the area of racial discrimination was undergoing in 1964.[16]

In sum, Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution. Thus, any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history. The cryptic nature of the language employed in Title VI merely reflects Congress' concern with the then-prevalent use of racial standards as a means of excluding or disadvantaging Negroes and its determination to prohibit absolutely such discrimination. We have recently held that " '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." ' " *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 10 (1976), quoting *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543–544 (1940). This is especially so when, as is the case here, the literal application of what is believed to be the plain language of the statute, assuming that it is so plain, would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose.[17]

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[16] See, *e. g.*, 110 Cong. Rec. 6544, 13820 (1964) (Sen. Humphrey); *id.*, at 6050 (Sen. Javits); *id.*, at 12677 (Sen. Allott).

[17] Our Brother STEVENS finds support for a colorblind theory of Title VI in its legislative history, but his interpretation gives undue weight to a few isolated passages from among the thousands of pages of the legislative history of Title VI. See *id.*, at 6547 (Sen. Humphrey); *id.*, at 6047, 7055 (Sen. Pastore); *id.*, at 12675 (Sen. Allott); *id.*, at 6561 (Sen. Kuchel). These fragmentary comments fall far short of supporting a congressional

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Section 602 of Title VI, 42 U. S. C. § 2000d–1, instructs federal agencies to promulgate regulations interpreting Title

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intent to prohibit a racially conscious admissions program designed to assist those who are likely to have suffered injuries from the effects of past discrimination. In the first place, these statements must be read in the context in which they were made. The concern of the speakers was far removed from the incidental injuries which may be inflicted upon nonminorities by the use of racial preferences. It was rather with the evil of the segregation of Negroes in federally financed programs and, in some cases, their arbitrary exclusion on account of race from the benefits of such programs. Indeed, in this context there can be no doubt that the Fourteenth Amendment does command color blindness and forbids the use of racial criteria. No consideration was given by these legislators, however, to the permissibility of racial preference designed to redress the effects of injuries suffered as a result of one's color. Significantly one of the legislators, Senator Pastore, and perhaps also Senator Kuchel, who described Title VI as proscribing decisionmaking based upon skin color, also made it clear that Title VI does not outlaw the use of racial criteria in all circumstances. See *supra*, at 339–340; 110 Cong. Rec. 6562 (1964). See also *id.*, at 2494 (Rep. Celler). Moreover, there are many statements in the legislative history explicitly indicating that Congress intended neither to require nor to prohibit the remedial use of racial preferences where not otherwise required or prohibited by the Constitution. Representative MacGregor addressed directly the problem of preferential treatment:

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level close to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically." *Id.*, at 15893.

Other legislators explained that the achievement of racial balance in elementary and secondary schools where there had been no segregation by law was not compelled by Title VI but was rather left to the judgment of state and local communities. See, *e. g.*, *id.*, at 10920 (Sen. Javits); *id.*, at 5807, 5266 (Sen. Keating); *id.*, at 13821 (Sens. Humphrey and

VI. These regulations, which, under the terms of the statute, require Presidential approval, are entitled to considerable deference in construing Title VI. See, *e. g.*, *Lau* v. *Nichols*,

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Saltonstall). See also, *id.*, at 6562 (Sen. Kuchel); *id.*, at 13695 (Sen. Pastore).

Much the same can be said of the scattered remarks to be found in the legislative history of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V), which prohibits employment discrimination on the basis of race in terms somewhat similar to those contained in Title VI, see 42 U. S. C. § 2000e–2 (a)(1) (unlawful "to fail or refuse to hire" any applicant "because of such individual's race, color, religion, sex, or national origin . . . ."), to the effect that any deliberate attempt by an employer to maintain a racial balance is not required by the statute and might in fact violate it. See, *e. g.*, 110 Cong. Rec. 7214 (1964) (Sens. Clark and Case); *id.*, at 6549 (Sen. Humphrey); *id.*, at 2560 (Rep. Goodell). Once again, there is no indication that Congress intended to bar the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination. Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends. The former may well be contrary to the requirements of the Fourteenth Amendment (where state action is involved), while the latter presents very different constitutional considerations. Indeed, as discussed *infra*, at 353, this Court has construed Title VII as requiring the use of racial preferences for the purpose of hiring and advancing those who have been adversely affected by past discriminatory employment practices, even at the expense of other employees innocent of discrimination. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 767–768 (1976). Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute. See *id.*, at 762–770; *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975). There is no more indication in the legislative history of Title VII than in that of Title VI that Congress desired to prohibit such affirmative action to the extent that it is permitted by the Constitution, yet judicial decisions as well as subsequent executive and congressional action clearly establish that Title VII does not forbid race-conscious remedial action. See *infra*, at 353–355, and n. 28.

414 U. S. 563 (1974); *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969). Consequently, it is most significant that the Department of Health, Education, and Welfare (HEW), which provides much of the federal assistance to institutions of higher education, has adopted regulations *requiring* affirmative measures designed to enable racial minorities which have been previously discriminated against by a federally funded institution or program to overcome the effects of such actions and *authorizing* the voluntary undertaking of affirmative-action programs by federally funded institutions that have not been guilty of prior discrimination in order to overcome the effects of conditions which have adversely affected the degree of participation by persons of a particular race.

Title 45 CFR § 80.3 (b)(6)(i) (1977) provides:

> "In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."

Title 45 CFR § 80.5 (i) (1977) elaborates upon this requirement:

> "In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6 (d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3 (b)(6) for such applicant or recipient to take additional steps to make the benefits

> fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served."

These regulations clearly establish that where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution, race-conscious action is not only permitted but required to accomplish the remedial objectives of Title VI.[18] Of course, there is no evidence that the Medical School has been guilty of past discrimination and consequently these regulations would not compel it to employ a program of preferential admissions in behalf of racial minorities. It would be difficult to explain from the language of Title VI, however, much less from its legislative history, why the statute *compels* race-conscious remedies where a recipient institution has engaged in past discrimination but *prohibits* such remedial action where racial minorities, as a result of the effects of past discrimination imposed by entities other than the recipient, are excluded from the benefits of federally funded programs. HEW was fully aware of the incongruous nature of such an interpretation of Title VI.

Title 45 CFR § 80.3 (b)(6)(ii) (1977) provides:

> "Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted

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[18] HEW has stated that the purpose of these regulations is "to specify that affirmative steps to make services more equitably available are not prohibited and that such steps are required when necessary to overcome the consequences of prior discrimination." 36 Fed. Reg. 23494 (1971). Other federal agencies which provide financial assistance pursuant to Title VI have adopted similar regulations. See Supplemental Brief for United States as *Amicus Curiae* 16 n. 14.

> in limiting participation by persons of a particular race, color, or national origin."

An explanatory regulation explicitly states that the affirmative action which § 80.3 (b)(6)(ii) contemplates includes the use of racial preferences:

> "Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." 45 CFR § 80.5 (j) (1977).

This interpretation of Title VI is fully consistent with the statute's emphasis upon voluntary remedial action and reflects the views of an agency [19] responsible for achieving its objectives.[20]

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[19] Moreover, the President has delegated to the Attorney General responsibility for coordinating the enforcement of Title VI by federal departments and agencies and has directed him to "assist the departments and agencies in accomplishing effective implementation." Exec. Order No. 11764, 3 CFR 849 (1971–1975 Comp.). Accordingly, the views of the Solicitor General, as well as those of HEW, that the use of racial preferences for remedial purposes is consistent with Title VI are entitled to considerable respect.

[20] HEW administers at least two explicitly race-conscious programs. Details concerning them may be found in the Office of Management and

The Court has recognized that the construction of a statute by those charged with its execution is particularly deserving of respect where Congress has directed its attention to the administrative construction and left it unaltered. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 381; *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965). Congress recently took just this kind of action when it considered an amendment to the Departments of Labor and Health, Education, and Welfare appropriation bill for 1978, which would have restricted significantly the remedial use of race in programs funded by the appropriation. The amendment, as originally submitted by Representative Ashbrook, provided that "[n]one of the funds appropriated in this Act may be used to initiate, carry out or enforce any program of affirmative action or any other system of quotas or goals in regard to admission policies or employment practices which encourage or require any discrimination on the basis of race, creed, religion, sex or age." 123 Cong.

Budget, 1977 Catalogue of Federal Domestic Assistance 205–206, 401–402. The first program, No. 13.375, "Minority Biomedical Support," has as its objectives:

"To increase the number of ethnic minority faculty, students, and investigators engaged in biomedical research. To broaden the opportunities for participation in biomedical research of ethnic minority faculty, students, and investigators by providing support for biomedical research programs at eligible institutions."

Eligibility for grants under this program is limited to (1) four-year colleges, universities, and health professional schools with over 50% minority enrollments; (2) four-year institutions with significant but not necessarily over 50% minority enrollment provided they have a history of encouragement and assistance to minorities; (3) two-year colleges with 50% minority enrollment; and (4) American Indian Tribal Councils. Grants made pursuant to this program are estimated to total $9,711,000 for 1977.

The second program, No. 13.880, entitled "Minority Access To Research Careers," has as its objective to "assist minority institutions to train greater numbers of scientists and teachers in health related fields." Grants under this program are made directly to individuals and to institutions for the purpose of enabling them to make grants to individuals.

Rec. 19715 (1977). In support of the measure, Representative Ashbrook argued that the 1964 Civil Rights Act never authorized the imposition of affirmative action and that this was a creation of the bureaucracy. *Id.*, at 19722. He explicitly stated, however, that he favored permitting universities to adopt affirmative-action programs giving consideration to racial identity but opposed the imposition of such programs by the Government. *Id.*, at 19715. His amendment was itself amended to reflect this position by only barring the *imposition* of race-conscious remedies by HEW:

> "None of the funds appropriated in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order issued by the Secretary of Health, Education, and Welfare which for purposes of compliance with any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." *Id.*, at 19722.

This amendment was adopted by the House. *Ibid.* The Senate bill, however, contained no such restriction upon HEW's authority to impose race-conscious remedies and the Conference Committee, upon the urging of the Secretary of HEW, deleted the House provision from the bill.[21] More significant for present purposes, however, is the fact that even the proponents of imposing limitations upon HEW's implementation of Title VI did not challenge the right of federally funded educational institutions voluntarily to extend preferences to racial minorities.

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[21] H. R. Conf. Rep. No. 95–538, p. 22 (1977); 123 Cong. Rec. 26188 (1977). See H. J. Res. 662, 95th Cong., 1st Sess. (1977); Pub. L. 95–205, 91 Stat. 1460.

Finally, congressional action subsequent to the passage of Title VI eliminates any possible doubt about Congress' views concerning the permissibility of racial preferences for the purpose of assisting disadvantaged racial minorities. It confirms that Congress did not intend to prohibit and does not now believe that Title VI prohibits the consideration of race as part of a remedy for societal discrimination even where there is no showing that the institution extending the preference has been guilty of past discrimination nor any judicial finding that the particular beneficiaries of the racial preference have been adversely affected by societal discrimination.

Just last year Congress enacted legislation [22] explicitly requiring that no grants shall be made "for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." The statute defines the term "minority business enterprise" as "a business, at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." The term "minority group members" is defined in explicitly racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Although the statute contains an exemption from this requirement "to the extent that the Secretary determines otherwise," this escape clause was provided only to deal with the possibility that certain areas of the country might not contain sufficient qualified "minority business enterprises" to permit compliance with the quota provisions of the legislation.[23]

The legislative history of this race-conscious legislation reveals that it represents a deliberate attempt to deal with

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[22] 91 Stat. 117, 42 U. S. C. § 6705 (f)(2) (1976 ed.).

[23] 123 Cong. Rec. 7156 (1977); *id.*, at 5327–5330.

the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises.[24] It was believed that such a "set-aside" was required in order to enable minorities, still "new on the scene" and "relatively small," to compete with larger and more established companies which would always be successful in underbidding minority enterprises. 123 Cong. Rec. 5327 (1977) (Rep. Mitchell). What is most significant about the congressional consideration of the measure is that although the use of a racial quota or "set-aside" by a recipient of federal funds would constitute a direct violation of Title VI if that statute were read to prohibit race-conscious action, no mention was made during the debates in either the House or the Senate of even the possibility that the quota provisions for minority contractors might in any way conflict with or modify Title VI. It is inconceivable that such a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative-action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964." 42 U. S. C. § 6709 (1976 ed.). Thus Congress was fully aware of the applicability of Title VI to the funding of public works projects. Under these circumstances, the enactment of the 10% "set-aside" for minority enterprises reflects a congressional judgment that the remedial use of race is permissible under Title VI. We have repeatedly recognized that subsequent legislation reflecting an interpretation of an earlier Act is entitled to great weight in determining the meaning of the earlier statute. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 380–

[24] See *id.*, at 7156 (Sen. Brooke).

381; *Erlenbaugh* v. *United States*, 409 U. S. 239, 243–244 (1972). See also *United States* v. *Stewart*, 311 U. S. 60, 64–65 (1940).[25]

C

Prior decisions of this Court also strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible. In *Lau* v. *Nichols*, 414 U. S. 563 (1974), the Court held that the failure of the San

[25] In addition to the enactment of the 10% quota provision discussed *supra*, Congress has also passed other Acts mandating race-conscious measures to overcome disadvantages experienced by racial minorities. Although these statutes have less direct bearing upon the meaning of Title VI, they do demonstrate that Congress believes race-conscious remedial measures to be both permissible and desirable under at least some circumstances. This in turn undercuts the likelihood that Congress intended to limit voluntary efforts to implement similar measures. For example, § 7 (a) of the National Science Foundation Authorization Act, 1977, provides:

"The Director of the National Science Foundation shall initiate an intensive search for qualified women, members of minority groups, and handicapped individuals to fill executive level positions in the National Science Foundation. In carrying out the requirement of this subsection, the Director shall work closely with organizations which have been active in seeking greater recognition and utilization of the scientific and technical capabilities of minorities, women, and handicapped individuals. The Director shall improve the representation of minorities, women, and handicapped individuals on advisory committees, review panels, and all other mechanisms by which the scientific community provides assistance to the Foundation." 90 Stat. 2056, note following 42 U. S. C. § 1873 (1976 ed.).

Perhaps more importantly, the Act also authorizes the funding of Minority Centers for Graduate Education. Section 7 (c)(2) of the Act, 90 Stat. 2056, requires that these Centers:

"(A) have substantial minority student enrollment;

"(B) are geographically located near minority population centers;

"(C) demonstrate a commitment to encouraging and assisting minority students, researchers, and faculty;

. . . . . .

"(F) will serve as a regional resource in science and engineering for the minority community which the Center is designed to serve; and

"(G) will develop joint educational programs with nearby undergradu-

Francisco school system to provide English-language instruction to students of Chinese ancestry who do not speak English, or to provide them with instruction in Chinese, constituted a violation of Title VI. The Court relied upon an HEW regulation which stipulates that a recipient of federal funds "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 CFR § 80.3 (b)(2) (1977). It interpreted this regulation as requiring San Francisco to extend the same educational benefits to Chinese-speaking students as to English-speaking students, even though there was no finding or allegation that the city's failure to do so was a result of a purposeful design to discriminate on the basis of race.

Lau is significant in two related respects. First, it indicates that in at least some circumstances agencies responsible for the administration of Title VI may require recipients who have not been guilty of any constitutional violations to depart from a policy of color blindness and to be cognizant of the impact of their actions upon racial minorities. Secondly, *Lau* clearly requires that institutions receiving federal funds be accorded considerable latitude in voluntarily undertaking race-conscious action designed to remedy the exclusion of significant num-

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ate institutions of higher education which have a substantial minority student enrollment."

Once again, there is no indication in the legislative history of this Act or elsewhere that Congress saw any inconsistency between the race-conscious nature of such legislation and the meaning of Title VI. And, once again, it is unlikely in the extreme that a Congress which believed that it had commanded recipients of federal funds to be absolutely colorblind would itself expend federal funds in such a race-conscious manner. See also the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U. S. C. § 801 *et seq.* (1976 ed.), 49 U. S. C. § 1657a *et seq.* (1976 ed.); the Emergency School Aid Act, 20 U. S. C. § 1601 *et seq.* (1976 ed.).

bers of minorities from the benefits of federally funded programs. Although this Court has not yet considered the question, presumably, by analogy to our decisions construing Title VII, a medical school would not be in violation of Title VI under *Lau* because of the serious underrepresentation of racial minorities in its student body as long as it could demonstrate that its entrance requirements correlated sufficiently with the performance of minority students in medical school and the medical profession.[26] It would be inconsistent with *Lau* and the emphasis of Title VI and the HEW regulations on voluntary action, however, to require that an institution wait to be adjudicated to be in violation of the law before being permitted to voluntarily undertake corrective action based upon a good-faith and reasonable belief that the failure of certain racial minorities to satisfy entrance requirements is not a measure of their ultimate performance as doctors but a result of the lingering effects of past societal discrimination.

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington* v. *Davis*, 426 U. S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. However, even accepting *Lau*'s implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent

[26] Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971).

in the least. First, for the reasons discussed *supra*, at 336–350, regardless of whether Title VI's prohibitions extend beyond the Constitution's, the evidence fails to establish, and, indeed, compels the rejection of, the proposition that Congress intended to prohibit recipients of federal funds from voluntarily employing race-conscious measures to eliminate the effects of past societal discrimination against racial minorities such as Negroes. Secondly, *Lau* itself, for the reasons set forth in the immediately preceding paragraph, strongly supports the view that voluntary race-conscious remedial action is permissible under Title VI. If discriminatory racial impact alone is enough to demonstrate at least a prima facie Title VI violation, it is difficult to believe that the Title would forbid the Medical School from attempting to correct the racially exclusionary effects of its initial admissions policy during the first two years of the School's operation.

The Court has also declined to adopt a "colorblind" interpretation of other statutes containing nondiscrimination provisions similar to that contained in Title VI. We have held under Title VII that where employment requirements have a disproportionate impact upon racial minorities they constitute a statutory violation, even in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job.[27] More significantly, the Court has required that preferences be given by employers to members of racial minorities as a remedy for past violations of Title VII, even where there has been no finding that the employer has acted with a discriminatory intent.[28] Finally, we have construed the Voting

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[27] *Ibid.*; *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975).

[28] *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976); *Teamsters* v. *United States*, 431 U. S. 324 (1977). Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race. Prior to the 1972 amendments to Title VII (Equal Employment Opportunity Act

Rights Act of 1965, 42 U. S. C. § 1973 *et seq.* (1970 ed. and Supp. V), which contains a provision barring any voting procedure or qualification that denies or abridges "the right of

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of 1972, 86 Stat. 103) a number of Courts of Appeals approved race-conscious action to remedy the effects of employment discrimination. See, *e. g., Heat & Frost Insulators & Asbestos Workers* v. *Vogler,* 407 F. 2d 1047 (CA5 1969); *United States* v. *Electrical Workers,* 428 F. 2d 144, 149–150 (CA6), cert. denied, 400 U. S. 943 (1970); *United States* v. *Sheetmetal Workers,* 416 F. 2d 123 (CA8 1969). In 1965, the President issued Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.), which as amended by Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.), required federal contractors to take affirmative action to remedy the disproportionately low employment of racial minorities in the construction industry. The Attorney General issued an opinion concluding that the race consciousness required by Exec. Order No. 11246 did not conflict with Title VII:

"It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria." 42 Op. Atty. Gen. 405, 411 (1969).

The federal courts agreed. See, *e. g., Contractors Assn. of Eastern Pa.* v. *Secretary of Labor,* 442 F. 2d 159 (CA3), cert. denied, 404 U. S. 854 (1971) (which also held, 442 F. 2d, at 173, that race-conscious affirmative action was permissible under Title VI); *Southern Illinois Builders Assn.* v. *Ogilvie,* 471 F. 2d 680 (CA7 1972). Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Exec. Order No. 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action. See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 723, 747–757 (1972). The section-by-section analysis of the 1972 amendments to Title VII undertaken by the Conference Committee Report on H. R. 1746 reveals a resolve to accept the then (as now) prevailing judicial interpretations of the scope of Title VII:

"In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that

any citizen of the United States to vote on account of race or color," as permitting States to voluntarily take race into account in a way that fairly represents the voting strengths of different racial groups in order to comply with the commands of the statute, even where the result is a gain for one racial group at the expense of others.[29]

These prior decisions are indicative of the Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to attain this objective. There is no justification for departing from this course in the case of Title VI and frustrating the clear judgment of Congress that race-conscious remedial action is permissible.

We turn, therefore, to our analysis of the Equal Protection Clause of the Fourteenth Amendment.

III

A

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," *Edwards* v. *California*, 314 U. S. 160, 185 (1941) (Jackson, J., concurring), summed up by the shorthand phrase "[o]ur Constitution is color-blind," *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. In-

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the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of the Equal Employment Opportunity Act of 1972, p. 1844 (Comm. Print 1972).

[29] *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977). See also *id.*, at 167–168 (opinion of WHITE, J.).

deed, we have expressly rejected this proposition on a number of occasions.

Our cases have always implied that an "overriding statutory purpose," *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964), could be found that would justify racial classifications. See, *e. g., ibid.; Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81, 100–101 (1943). More recently, in *McDaniel* v. *Barresi*, 402 U. S. 39 (1971), this Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was *per se* invalid because it was not colorblind. And in *North Carolina Board of Education* v. *Swann* we held, again unanimously, that a statute mandating colorblind school-assignment plans could not stand "against the background of segregation," since such a limit on remedies would "render illusory the promise of *Brown* [*I*]." 402 U. S., at 45–46.

We conclude, therefore, that racial classifications are not *per se* invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

B

Respondent argues that racial classifications are always suspect and, consequently, that this Court should weigh the importance of the objectives served by Davis' special admissions program to see if they are compelling. In addition, he asserts that this Court must inquire whether, in its judgment, there are alternatives to racial classifications which would suit Davis' purposes. Petitioner, on the other hand, states that our proper role is simply to accept petitioner's determination that the racial classifications used by its program are reasonably related to what it tells us are its benign

purposes. We reject petitioner's view, but, because our prior cases are in many respects inapposite to that before us now, we find it necessary to define with precision the meaning of that inexact term, "strict scrutiny."

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.[30] See, *e. g.*, *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 16–17 (1973); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). But no fundamental right is involved here. See *San Antonio*, *supra*, at 29–36. Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*, at 28; see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938).[31]

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant and therefore prohibited." *Hirabayashi*, *supra*, at 100. Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of govern-

[30] We do not pause to debate whether our cases establish a "two-tier" analysis, a "sliding scale" analysis, or something else altogether. It is enough for present purposes that strict scrutiny is applied at least in some cases.

[31] Of course, the fact that whites constitute a political majority in our Nation does not necessarily mean that active judicial scrutiny of racial classifications that disadvantage whites is inappropriate. Cf. *Castaneda* v. *Partida*, 430 U. S. 482, 499–500 (1977); *id.*, at 501 (MARSHALL, J., concurring).

ment behind racial hatred and separatism—are invalid without more. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886);[32] accord, *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880); *Korematsu* v. *United States*, *supra*, at 223; *Oyama* v. *California*, 332 U. S. 633, 663 (1948) (Murphy, J., concurring); *Brown I*, 347 U. S. 483 (1954); *McLaughlin* v. *Florida*, *supra*, at 191–192; *Loving* v. *Virginia*, *supra*, at 11–12; *Reitman* v. *Mulkey*, 387 U. S. 369, 375–376 (1967); *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 165 (1977) (*UJO*) (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.); *id.*, at 169 (opinion concurring in part).[33]

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases.[34] "'[T]he mere recitation of a benign, compensatory purpose is not an automatic shield

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[32] "[T]he conclusion cannot be resisted, that no reason for [the refusal to issue permits to Chinese] exists except hostility to the race and nationality to which the petitioners belong . . . . The discrimination is, therefore, illegal . . . ."

[33] Indeed, even in *Plessy* v. *Ferguson* the Court recognized that a classification by race that presumed one race to be inferior to another would have to be condemned. See 163 U. S., at 544–551.

[34] Paradoxically, petitioner's argument is supported by the cases generally thought to establish the "strict scrutiny" standard in race cases, *Hirabayashi* v. *United States*, 320 U. S. 81 (1943), and *Korematsu* v. *United States*, 323 U. S. 214 (1944). In *Hirabayashi*, for example, the Court, responding to a claim that a racial classification was rational, sustained a racial classification solely on the basis of a conclusion in the double negative that it could not say that facts which might have been available "could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States." 320 U. S., at 101. A similar mode of analysis was followed in *Korematsu*, see 323 U. S., at 224, even though the Court stated there that racial classifications were "immediately suspect" and should be subject to "the most rigid scrutiny." *Id.*, at 216.

which protects against any inquiry into the actual purposes underlying a statutory scheme.' " *Califano* v. *Webster*, 430 U. S. 313, 317 (1977), quoting *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975). Instead, a number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes " 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " *Califano* v. *Webster*, *supra*, at 317, quoting *Craig* v. *Boren*, 429 U. S. 190, 197 (1976).[35]

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[35] We disagree with our Brother POWELL's suggestion, *ante*, at 303, that the presence of "rival groups which can claim that they, too, are entitled to preferential treatment" distinguishes the gender cases or is relevant to the question of scope of judicial review of race classifications. We are not asked to determine whether groups other than those favored by the Davis program should similarly be favored. All we are asked to do is to pronounce the constitutionality of what Davis has done.

But, were we asked to decide whether any given rival group—German-Americans for example—must constitutionally be accorded preferential treatment, we do have a "principled basis," *ante*, at 296, for deciding this question, one that is well established in our cases: The Davis program expressly sets out four classes which receive preferred status. *Ante*, at 274. The program clearly distinguishes whites, but one cannot reason from this a conclusion that German-Americans, as a national group, are singled out for invidious treatment. And even if the Davis program had a differential impact on German-Americans, they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German-Americans. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 264–265 (1977); *Washington* v. *Davis*, 426 U. S. 229, 238–241 (1976). If this could not be shown, then "the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable," *Katzenbach* v. *Morgan*, 384 U. S. 641, 657 (1966), and the only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded. See *ibid.*; *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 38–39 (1973) (applying *Katzenbach* test to state action intended to remove discrimination in edu-

First, race, like, "gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Kahn* v. *Shevin*, 416 U. S. 351, 357 (1974) (dissenting opinion). While a carefully tailored statute designed to remedy past discrimination could avoid these vices, see *Califano* v. *Webster, supra; Schlesinger* v. *Ballard*, 419 U. S. 498 (1975); *Kahn* v. *Shevin, supra*, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. Cf. *Schlesinger* v. *Ballard, supra*, at 508; *UJO, supra*, at 174, and n. 3 (opinion concurring in part); *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in judgment). See also *Stanton* v. *Stanton*, 421 U. S. 7, 14–15 (1975). State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own. See *UJO, supra*, at 172 (opinion concurring in part); *ante*, at 298 (opinion of POWELL, J.).

Second, race, like gender and illegitimacy, see *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not *per se* invalid because it divides classes on the basis of an immutable characteristic, see *supra*, at 355–356, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or

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cational opportunity). Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

wrongdoing," *Weber, supra,* at 175; *Frontiero* v. *Richardson,* 411 U. S. 677, 686 (1973) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.), and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual. See *UJO,* 430 U. S., at 173 (opinion concurring in part); *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552, 566 (1947) (Rutledge, J., dissenting).

Because this principle is so deeply rooted it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: The "natural consequence of our governing processes [may well be] that the most 'discrete and insular' of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination." *UJO, supra,* at 174 (opinion concurring in part). Moreover, it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics. See, *e. g., Weber, supra.* Thus, even if the concern for individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the Fourteenth Amendment. See *Lucas* v. *Colorado General Assembly,* 377 U. S. 713, 736 (1964).

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the Fourteenth Amendment should be

strict—not " 'strict' in theory and fatal in fact," [36] because it is stigma that causes fatality—but strict and searching nonetheless.

IV

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.

A

At least since *Green* v. *County School Board*, 391 U. S. 430 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance. Three years later, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), and its companion cases, *Davis* v. *School Comm'rs of Mobile County*, 402 U. S. 33 (1971); *McDaniel* v. *Barresi*, 402 U. S. 39 (1971); and *North Carolina Board of Education* v. *Swann*, 402 U. S. 43 (1971), reiterated that racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions. See, *e. g.*, *Charlotte-Mecklenburg*, *supra*, at 28. And the Court further held both that courts could enter desegregation orders which assigned students and faculty by reference to race, *Charlotte-Mecklenburg*, *supra*; *Davis*, *supra*; *United States* v. *Montgomery County Board of Ed.*, 395 U. S. 225 (1969), and that local school boards could *voluntarily* adopt desegregation

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[36] Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

plans which made express reference to race if this was necessary to remedy the effects of past discrimination. *McDaniel* v. *Barresi, supra.* Moreover, we stated that school boards, even in the absence of a judicial finding of past discrimination, could voluntarily adopt plans which assigned students with the end of creating racial pluralism by establishing fixed ratios of black and white students in each school. *Charlotte-Mecklenburg, supra,* at 16. In each instance, the creation of unitary school systems, in which the effects of past discrimination had been "eliminated root and branch," *Green, supra,* at 438, was recognized as a compelling social goal justifying the overt use of race.

Finally, the conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination. Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. See *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747 (1976); *Teamsters* v. *United States,* 431 U. S. 324 (1977). Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. See *id.,* at 357–362. Nor is it an objection to such relief that preference for minorities will upset the settled expectations of nonminorities. See *Franks, supra.* In addition, we have held that Congress, to remove barriers to equal opportunity, can and has required employers to use test criteria that fairly reflect the qualifications of minority applicants

vis-à-vis nonminority applicants, even if this means interpreting the qualifications of an applicant in light of his race. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 435 (1975).[37]

These cases cannot be distinguished simply by the presence of judicial findings of discrimination, for race-conscious remedies have been approved where such findings have not been made. *McDaniel* v. *Barresi, supra; UJO;* see *Califano* v. *Webster*, 430 U. S. 313 (1977); *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975); *Kahn* v. *Shevin*, 416 U. S. 351 (1974). See also *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966). Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.[38]

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[37] In *Albemarle*, we approved "differential validation" of employment tests. See 422 U. S., at 435. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a minority corresponded in "potential for employment" to a 60 for whites, the test could not be used consistently with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices.

[38] Indeed, Titles VI and VII of the Civil Rights Act of 1964 put great emphasis on voluntarism in remedial action. See *supra*, at 336–338. And, significantly, the Equal Employment Opportunity Commission has recently proposed guidelines authorizing employers to adopt racial preferences as a remedial measure where they have a reasonable basis for

Nor can our cases be distinguished on the ground that the entity using explicit racial classifications itself had violated § 1 of the Fourteenth Amendment or an antidiscrimination regulation, for again race-conscious remedies have been approved where this is not the case. See *UJO*, 430 U. S., at 157 (opinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.);[39] *id.*, at 167 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.);[40] cf. *Califano* v. *Webster, supra,* at 317; *Kahn* v. *Shevin, supra.* Moreover, the presence or absence of past discrimination by universities or employers is largely irrelevant to resolving respondent's constitutional claims. The claims of those burdened by the race-conscious actions of a university or employer who has never been adjudged in violation of an antidiscrimination law are not any more or less entitled to deference than the claims of the burdened nonminority workers in *Franks* v. *Bowman Transportation Co., supra,* in which the employer had violated Title VII, for in each case the employees are innocent of past discrimination. And, although it might be argued that, where an employer has violated an antidiscrimination law, the expectations of nonminority workers are themselves products of discrimination and hence "tainted," see *Franks, supra,* at 776, and therefore more easily upset, the same argument can be made with respect to respondent. If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, than there is a reasonable likelihood that, but for pervasive racial discrim-

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believing that they might otherwise be held in violation of Title VII. See 42 Fed. Reg. 64826 (1977).

[39] "[T]he [Voting Rights] Act's prohibition . . . is not dependent upon proving past unconstitutional apportionments . . . ."

[40] "[T]he State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."

ination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program.[41]

Thus, our cases under Title VII of the Civil Rights Act have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination.[42]

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[41] Our cases cannot be distinguished by suggesting, as our Brother POWELL does, that in none of them was anyone deprived of "the relevant benefit." *Ante*, at 304. Our school cases have deprived whites of the neighborhood school of their choice; our Title VII cases have deprived nondiscriminating employees of their settled seniority expectations; and *UJO* deprived the Hassidim of bloc-voting strength. Each of these injuries was constitutionally cognizable as is respondent's here.

[42] We do not understand MR. JUSTICE POWELL to disagree that providing a remedy for past racial prejudice can constitute a compelling purpose sufficient to meet strict scrutiny. See *ante*, at 305. Yet, because petitioner is a corporation administering a university, he would not allow it to exercise such power in the absence of "judicial, legislative, or administrative findings of constitutional or statutory violations." *Ante*, at 307. While we agree that reversal in this case would follow *a fortiori* had Davis been guilty of invidious racial discrimination or if a federal statute mandated that universities refrain from applying any admissions policy that had a disparate and unjustified racial impact, see, *e. g.*, *McDaniel* v. *Barresi*, 402 U. S. 39 (1971); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), we do not think it of constitutional significance that Davis has not been so adjudged.

Generally, the manner in which a State chooses to delegate governmental functions is for it to decide. Cf. *Sweezy* v. *New Hampshire*, 354 U. S. 234,

Title VII was enacted pursuant to Congress' power under the Commerce Clause and § 5 of the Fourteenth Amendment. To the extent that Congress acted under the Commerce Clause power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the Due Process Clause of the Fifth Amendment precisely to the same extent as are the States by § 1 of the Fourteenth Amendment.[43] Therefore, to the extent that Title VII rests on the Commerce Clause power, our decisions such as *Franks* and

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256 (1957) (Frankfurter, J., concurring in result). California, by constitutional provision, has chosen to place authority over the operation of the University of California in the Board of Regents. See Cal. Const., Art. 9, § 9 (a). Control over the University is to be found not in the legislature, but rather in the Regents who have been vested with full legislative (including policymaking), administrative, and adjudicative powers by the citizens of California. See *ibid.*; *Ishimatsu* v. *Regents*, 266 Cal. App. 2d 854, 863–864, 72 Cal. Rptr. 756, 762–763 (1968); *Goldberg* v. *Regents*, 248 Cal. App. 2d 867, 874, 57 Cal. Rptr. 463, 468 (1967); 30 Op. Cal. Atty. Gen. 162, 166 (1957) ("The Regents, not the legislature, have the general rule-making or policy-making power in regard to the University"). This is certainly a permissible choice, see *Sweezy*, *supra*, and we, unlike our Brother POWELL, find nothing in the Equal Protection Clause that requires us to depart from established principle by limiting the scope of power the Regents may exercise more narrowly than the powers that may constitutionally be wielded by the Assembly.

Because the Regents can exercise plenary legislative and administrative power, it elevates form over substance to insist that Davis could not use race-conscious remedial programs until it had been adjudged in violation of the Constitution or an antidiscrimination statute. For, if the Equal Protection Clause required such a violation as a predicate, the Regents could simply have promulgated a regulation prohibiting disparate treatment not justified by the need to admit only qualified students, and could have declared Davis to have been in violation of such a regulation on the basis of the exclusionary effect of the admissions policy applied during the first two years of its operation. See *infra*, at 370.

[43] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valeo*, 424 U. S. 1, 93 (1976) (*per curiam*), citing *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638 n. 2 (1975).

Teamsters v. *United States*, 431 U. S. 324 (1977), implicitly recognize that the affirmative use of race is consistent with the equal protection component of the Fifth Amendment and therefore with the Fourteenth Amendment. To the extent that Congress acted pursuant to § 5 of the Fourteenth Amendment, those cases impliedly recognize that Congress was empowered under that provision to accord preferential treatment to victims of past discrimination in order to overcome the effects of segregation, and we see no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 98 (1945) (Frankfurter, J., concurring).[44] We there-

[44] *Railway Mail Assn.* held that a state statute forbidding racial discrimination by certain labor organizations did not abridge the Association's due process rights secured by the Fourteenth Amendment because that result "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." 326 U. S., at 94. That case thus established the principle that a State voluntarily could go beyond what the Fourteenth Amendment required in eliminating private racial discrimination.

fore conclude that Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria.

B

Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. There is no question that Davis' program is valid under this test.

Certainly, on the basis of the undisputed factual submissions before this Court, Davis had a sound basis for believing that the problem of underrepresentation of minorities was substantial and chronic and that the problem was attributable to handicaps imposed on minority applicants by past and present racial discrimination. Until at least 1973, the practice of medicine in this country was, in fact, if not in law, largely the prerogative of whites.[45] In 1950, for example, while Negroes

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[45] According to 89 schools responding to a questionnaire sent to 112 medical schools (all of the then-accredited medical schools in the United States except Howard and Meharry), substantial efforts to admit minority students did not begin until 1968. That year was the earliest year of involvement for 34% of the schools; an additional 66% became involved during the years 1969 to 1973. See C. Odegaard, Minorities in Medicine: From Receptive Passivity to Positive Action, 1966–1976, p. 19 (1977) (hereinafter Odegaard). These efforts were reflected in a significant increase in the percentage of minority M. D. graduates. The number of American Negro graduates increased from 2.2% in 1970 to 3.3% in 1973 and 5.0% in 1975. Significant percentage increases in the number of Mexican-American, American Indian, and mainland Puerto Rican graduates were also recorded during those years. *Id.*, at 40.

The statistical information cited in this and the following notes was compiled by Government officials or medical educators, and has been

constituted 10% of the total population, Negro physicians constituted only 2.2% of the total number of physicians.[46] The overwhelming majority of these, moreover, were educated in two predominantly Negro medical schools, Howard and Meharry.[47] By 1970, the gap between the proportion of Negroes in medicine and their proportion in the population had widened: The number of Negroes employed in medicine remained frozen at 2.2% [48] while the Negro population had increased to 11.1%.[49] The number of Negro admittees to predominantly white medical schools, moreover, had declined in absolute numbers during the years 1955 to 1964. Odegaard 19.

Moreover, Davis had very good reason to believe that the national pattern of underrepresentation of minorities in medicine would be perpetuated if it retained a single admissions standard. For example, the entering classes in 1968 and 1969, the years in which such a standard was used, included only 1 Chicano and 2 Negroes out of the 50 admittees for each year. Nor is there any relief from this pattern of underrepresentation in the statistics for the regular admissions program in later years.[50]

Davis clearly could conclude that the serious and persistent underrepresentation of minorities in medicine depicted by these statistics is the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education

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brought to our attention in many of the briefs. Neither the parties nor the *amici* challenge the validity of the statistics alluded to in our discussion.

[46] D. Reitzes, Negroes and Medicine, pp. xxvii, 3 (1958).

[47] Between 1955 and 1964, for example, the percentage of Negro physicians graduated in the United States who were trained at these schools ranged from 69.0% to 75.8%. See Odegaard 19.

[48] U. S. Dept. of Health, Education, and Welfare, Minorities and Women in the Health Fields 7 (Pub. No. (HRA) 75-22, May 1974).

[49] U. S. Dept. of Commerce, Bureau of the Census, 1970 Census, vol. 1, pt. 1, Table 60 (1973).

[50] See *ante*, at 276 n. 6 (opinion of POWELL, J.).

and in society generally, as well as in the medical profession. From the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity. Under slavery, penal sanctions were imposed upon anyone attempting to educate Negroes.[51] After enactment of the Fourteenth Amendment the States continued to deny Negroes equal educational opportunity, enforcing a strict policy of segregation that itself stamped Negroes as inferior, *Brown I*, 347 U. S. 483 (1954), that relegated minorities to inferior educational institutions,[52] and that denied them intercourse in the mainstream of professional life necessary to advancement. See *Sweatt* v. *Painter*, 339 U. S. 629 (1950). Segregation was not limited to public facilities, moreover, but was enforced by criminal penalties against private action as well. Thus, as late as 1908, this Court enforced a state criminal conviction against a private college for teaching Negroes together with whites. *Berea College* v. *Kentucky*, 211 U. S. 45. See also *Plessy* v. *Ferguson*, 163 U. S. 537 (1896).

Green v. *County School Board*, 391 U. S. 430 (1968), gave explicit recognition to the fact that the habit of discrimination and the cultural tradition of race prejudice cultivated by centuries of legal slavery and segregation were not immediately dissipated when *Brown I*, *supra*, announced the constitutional principle that equal educational opportunity and participation in all aspects of American life could not be denied on the basis of race. Rather, massive official and private resistance prevented, and to a lesser extent still prevents, attainment of equal opportunity in education at all levels and in the professions. The generation of minority students applying to Davis Medical School since it opened in 1968—most of whom

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[51] See, *e. g.*, R. Wade, Slavery in the Cities: The South 1820–1860, pp. 90–91 (1964).

[52] For an example of unequal facilities in California schools, see *Soria* v. *Oxnard School Dist. Board*, 386 F. Supp. 539, 542 (CD Cal. 1974). See also R. Kluger, Simple Justice (1976).

were born before or about the time *Brown I* was decided—clearly have been victims of this discrimination. Judicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minority applicants;[53] many minority group members living in California, moreover, were born and reared in school districts in Southern States segregated by law.[54] Since separation of schoolchildren by race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," *Brown I, supra,* at 494, the conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance to *Brown I,* or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination, cf. *Reitman* v. *Mulkey,* 387 U. S. 369 (1967), and yet come to the starting line with an education equal to whites.[55]

Moreover, we need not rest solely on our own conclusion that Davis had sound reason to believe that the effects of past discrimination were handicapping minority applicants to the Medical School, because the Department of Health, Education, and Welfare, the expert agency charged by Congress with promulgating regulations enforcing Title VI of the Civil Rights Act of 1964, see *supra,* at 341–343, has also reached the conclusion that race may be taken into account in situations

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[53] See, *e. g., Crawford* v. *Board of Education,* 17 Cal. 3d 280, 551 P. 2d 28 (1976); *Soria* v. *Oxnard School Dist. Board, supra; Spangler* v. *Pasadena City Board of Education,* 311 F. Supp. 501 (CD Cal. 1970); C. Wollenberg, All Deliberate Speed: Segregation and Exclusion in California Schools, 1855–1975, pp. 136–177 (1976).

[54] For example, over 40% of American-born Negro males aged 20 to 24 residing in California in 1970 were born in the South, and the statistic for females was over 48%. These statistics were computed from data contained in Census, *supra* n. 49, pt. 6, California, Tables 139, 140.

[55] See, *e. g.,* O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L. J. 699, 729–731 (1971).

where a failure to do so would limit participation by minorities in federally funded programs, and regulations promulgated by the Department expressly contemplate that appropriate race-conscious programs may be adopted by universities to remedy unequal access to university programs caused by their own or by past societal discrimination. See *supra*, at 344–345, discussing 45 CFR §§ 80.3 (b)(6)(ii) and 80.5 (j) (1977). It cannot be questioned that, in the absence of the special admissions program, access of minority students to the Medical School would be severely limited and, accordingly, race-conscious admissions would be deemed an appropriate response under these federal regulations. Moreover, the Department's regulatory policy is not one that has gone unnoticed by Congress. See *supra*, at 346–347. Indeed, although an amendment to an appropriations bill was introduced just last year that would have prevented the Secretary of Health, Education, and Welfare from mandating race-conscious programs in university admissions, proponents of this measure, significantly, did not question the validity of voluntary implementation of race-conscious admissions criteria. See *ibid.* In these circumstances, the conclusion implicit in the regulations—that the lingering effects of past discrimination continue to make race-conscious remedial programs appropriate means for ensuring equal educational opportunity in universities—deserves considerable judicial deference. See, *e. g.*, *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *UJO*, 430 U. S., at 175–178 (opinion concurring in part).[56]

C

The second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race

[56] Congress and the Executive have also adopted a series of race-conscious programs, each predicated on an understanding that equal opportunity cannot be achieved by neutrality because of the effects of past and present discrimination. See *supra*, at 348–349.

is reasonably used in light of the program's objectives—is clearly satisfied by the Davis program.

It is not even claimed that Davis' program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program. It does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together. True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage—less than their proportion of the California population [57]—of otherwise underrepresented qualified minority applicants.[58]

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[57] Negroes and Chicanos alone constitute approximately 22% of California's population. This percentage was computed from data contained in Census, *supra* n. 49, pt. 6, California, sec. 1, 6–4, and Table 139.

[58] The constitutionality of the special admissions program is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California, see *ibid.*, and to those minority applicants deemed qualified for admission and deemed likely to contribute to the Medical School and the medical profession. Record 67. This is consistent with the goal of putting minority applicants in the position they would have been in if not for the evil of racial discrimination. Accordingly, this case does not raise the question whether even a remedial use of race would be unconstitutional if it admitted unqualified minority applicants in preference to qualified applicants or admitted, as a result of preferential consideration, racial minorities in numbers significantly in excess of their proportional representation in the relevant population. Such programs might well be inadequately justified by the legitimate remedial objectives. Our allusion to the proportional percentage of minorities in the population of the State administering the program is not intended to establish either that figure or that population universe as a constitutional benchmark. In this case,

Nor was Bakke in any sense stamped as inferior by the Medical School's rejection of him. Indeed, it is conceded by all that he satisfied those criteria regarded by the school as generally relevant to academic performance better than most of the minority members who were admitted. Moreover, there is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.

In addition, there is simply no evidence that the Davis program discriminates intentionally or unintentionally against any minority group which it purports to benefit. The program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted. Nor can the program reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior. The Davis program does not simply advance less qualified applicants; rather, it compensates applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of

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even respondent, as we understand him, does not argue that, if the special admissions program is otherwise constitutional, the allotment of 16 places in each entering class for special admittees is unconstitutionally high.

state-fostered discrimination. Once admitted, these students must satisfy the same degree requirements as regularly admitted students; they are taught by the same faculty in the same classes; and their performance is evaluated by the same standards by which regularly admitted students are judged. Under these circumstances, their performance and degrees must be regarded equally with the regularly admitted students with whom they compete for standing. Since minority graduates cannot justifiably be regarded as less well qualified than nonminority graduates by virtue of the special admissions program, there is no reasonable basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.

D

We disagree with the lower courts' conclusion that the Davis program's use of race was unreasonable in light of its objectives. First, as petitioner argues, there are no practical means by which it could achieve its ends in the foreseeable future without the use of race-conscious measures. With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socioeconomic level.[59] For example, of a class of recent medical school applicants from families with less than $10,000 income, at least 71% were white.[60] Of all 1970 families headed by a

[59] See Census, *supra* n. 49, Sources and Structure of Family Income, pp. 1–12.

[60] This percentage was computed from data presented in B. Waldman, Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U. S. Medical Schools 34 (Table A–15), 42 (Table A–23) (Association of American Medical Colleges 1977).

person *not* a high school graduate which included related children under 18, 80% were white and 20% were racial minorities.[61] Moreover, while race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than do disadvantaged whites.[62] These statistics graphically illustrate that the University's purpose to integrate its classes by compensating for past discrimination could not be achieved by a general preference for the economically disadvantaged or the children of parents of limited education unless such groups were to make up the entire class.

Second, the Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program. True, the procedure by which disadvantage is detected is informal, but we have never insisted that educators conduct their affairs through adjudicatory proceedings, and such insistence here is misplaced. A case-by-case inquiry into the extent to which each individual applicant has been affected, either directly or indirectly, by racial discrimination, would seem to be, as a practical matter, virtually impossible, despite the fact that there are excellent reasons for concluding that such effects generally exist. When individual measurement is impossible or extremely impractical, there is nothing to prevent a State

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[61] This figure was computed from data contained in Census, *supra* n. 49, pt. 1, United States Summary, Table 209.

[62] See Waldman, *supra* n. 60, at 10–14 (Figures 1–5).

from using categorical means to achieve its ends, at least where the category is closely related to the goal. Cf. *Gaston County* v. *United States*, 395 U. S. 285, 295–296 (1969); *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966). And it is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great. See *Teamsters* v. *United States*, 431 U. S. 324 (1977).

E

Finally, Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. Furthermore, the extent of the preference inevitably depends on how many minority applicants the particular school is seeking to admit in any particular year so long as the number of qualified minority applicants exceeds that number. There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.[63]

[63] The excluded white applicant, despite MR. JUSTICE POWELL's conten-

The "Harvard" program, see *ante*, at 316–318, as those employing it readily concede, openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students. That the Harvard approach does not also make public the extent of the preference and the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of Fourteenth Amendment adjudication. It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." If it is, any State, including California, is free to adopt it in preference to a less acceptable alternative, just as it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program. But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.

V

Accordingly, we would reverse the judgment of the Supreme Court of California holding the Medical School's special admissions program unconstitutional and directing respondent's admission, as well as that portion of the judgment enjoining the Medical School from according any consideration to race in the admissions process.

MR. JUSTICE WHITE.

I write separately concerning the question of whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action

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tion to the contrary, *ante*, at 318 n. 52, receives no more or less "individualized consideration" under our approach than under his.

exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer. If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider respondent's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See *United States* v. *Griffin*, 303 U. S. 226, 229 (1938).[1] Furthermore, just as it is inappropriate to address constitutional issues without determining whether statutory grounds urged before us are dispositive, it is at least questionable practice to adjudicate a novel and difficult statutory issue without first considering whether we have jurisdiction to decide it. Consequently, I address the question of whether respondent may bring suit under Title VI.

A private cause of action under Title VI, in terms both of

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[1] It is also clear from *Griffin* that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties . . . ." 303 U. S., at 229. See also *Mount Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 278 (1977); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).

In *Lau* v. *Nichols*, 414 U. S. 563 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But the existence of a private cause of action was not at issue. In addition, the understanding of MR. JUSTICE STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School District, a theory not alleged by the present respondent. *Id.*, at 571 n. 2. Furthermore, the plaintiffs in *Lau* alleged jurisdiction under 42 U. S. C. § 1983 rather than directly under the provisions of Title VI, as does the plaintiff in this case. Although the Court undoubtedly had an obligation to consider the jurisdictional question, this is surely not the first instance in which the Court has bypassed a jurisdictional problem not presented by the parties. Certainly the Court's silence on the jurisdictional question, when considered in the context of the indifference of the litigants to it and the fact that jurisdiction was alleged under § 1983, does not foreclose a reasoned conclusion that Title VI affords no private cause of action.

the Civil Rights Act as a whole and that Title, would not be "consistent with the underlying purposes of the legislative scheme" and would be contrary to the legislative intent. *Cort* v. *Ash*, 422 U. S. 66, 78 (1975). Title II, 42 U. S. C. § 2000a *et seq.*, dealing with public accommodations, and Title VII, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V), dealing with employment, proscribe private discriminatory conduct that as of 1964 neither the Constitution nor other federal statutes had been construed to forbid. Both Titles carefully provided for private actions as well as for official participation in enforcement. Title III, 42 U. S. C. § 2000b *et seq.*, and Title IV, 42 U. S. C. § 2000c *et seq.* (1970 ed. and Supp. V), dealing with public facilities and public education, respectively, authorize suits by the Attorney General to eliminate racial discrimination in these areas. Because suits to end discrimination in public facilities and public education were already available under 42 U. S. C. § 1983, it was, of course, unnecessary to provide for private actions under Titles III and IV. But each Title carefully provided that its provisions for public actions would not adversely affect pre-existing private remedies. §§ 2000b–2 and 2000c–8.

The role of Title VI was to terminate federal financial support for public and private institutions or programs that discriminated on the basis of race. Section 601, 42 U. S. C. § 2000d, imposed the proscription that no person, on the grounds of race, color, or national origin, was to be excluded from or discriminated against under any program or activity receiving federal financial assistance. But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI.

It is also evident from the face of § 602, 42 U. S. C. § 2000d–1, that Congress intended the departments and agen-

cies to define and to refine, by rule or regulation, the general proscription of § 601, subject only to judicial review of agency action in accordance with established procedures. Section 602 provides for enforcement: Every federal department or agency furnishing financial support is to implement the proscription by appropriate rule or regulation, each of which requires approval by the President. Termination of funding as a sanction for noncompliance is authorized, but *only* after a hearing and after the failure of voluntary means to secure compliance. Moreover, termination may not take place until the department or agency involved files with the appropriate committees of the House and Senate a full written report of the circumstances and the grounds for such action and 30 days have elapsed thereafter. Judicial review was provided, at least for actions terminating financial assistance.

Termination of funding was regarded by Congress as a serious enforcement step, and the legislative history is replete with assurances that it would not occur until every possibility for conciliation had been exhausted.[2] To allow a private

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[2] "Yet, before that principle [that 'Federal funds are not to be used to support racial discrimination'] is implemented to the detriment of any person, agency, or State, regulations giving notice of what conduct is required must be drawn up by the agency administering the program. . . . Before such regulations become effective, they must be submitted to and approved by the President.

"Once having become effective, there is still a long road to travel before any sanction whatsoever is imposed. Formal action to compel compliance can only take place after the following has occurred: first, there must be an unsuccessful attempt to obtain voluntary compliance; second, there must be an administrative hearing; third, a written report of the circumstances and the grounds for such action must be filed with the appropriate committees of the House and Senate; and fourth, 30 days must have elapsed between such filing and the action denying benefits under a Federal program. Finally, even that action is by no means final because it is subject to judicial review and can be further postponed by judicial action granting temporary relief pending review in order to avoid irreparable injury. It would be difficult indeed to concoct any additional safe-

individual to sue to cut off funds under Title VI would compromise these assurances and short circuit the procedural preconditions provided in Title VI. If the Federal Government may not cut off funds except pursuant to an agency rule, approved by the President, and presented to the appropriate committee of Congress for a layover period, and after voluntary means to achieve compliance have failed, it is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites themselves.

Furthermore, although Congress intended Title VI to end federal financial support for racially discriminatory policies of not only public but also private institutions and programs, it is extremely unlikely that Congress, without a word indicating that it intended to do so, contemplated creating an independent, private statutory cause of action against all private as well as public agencies that might be in violation of the section. There is no doubt that Congress regarded private litigation as an important tool to attack discriminatory practices. It does not at all follow, however, that Congress anticipated new private actions under Title VI itself. Wherever a discriminatory program was a public undertaking, such as a public school, private remedies were already available under other statutes, and a private remedy under Title VI was

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guards to incorporate in such a procedure." 110 Cong. Rec. 6749 (1964) (Sen. Moss).

"[T]he authority to cut off funds is hedged about with a number of procedural restrictions. . . . [There follow details of the preliminary steps.]

"In short, title VI is a reasonable, moderate, cautious, carefully worked out solution to a situation that clearly calls for legislative action." *Id.*, at 6544 (Sen. Humphrey). "Actually, *no action whatsoever* can be taken against anyone until the Federal agency involved has advised the appropriate person of his failure to comply with nondiscrimination requirements and until voluntary efforts to secure compliance have failed." *Id.*, at 1519 (Rep. Celler) (emphasis added). See also remarks of Sen. Ribicoff (*id.*, at 7066–7067); Sen. Proxmire (*id.*, at 8345); Sen. Kuchel (*id.*, at 6562). These safeguards were incorporated into 42 U. S. C. § 2000d–1.

unnecessary. Congress was well aware of this fact. Significantly, there was frequent reference to *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (CA4 1963), cert. denied, 376 U. S. 938 (1964), throughout the congressional deliberations. See, *e. g.*, 110 Cong. Rec. 6544 (1964) (Sen. Humphrey). *Simkins* held that under appropriate circumstances, the operation of a private hospital with "massive use of public funds and extensive state-federal sharing in the common plan" constituted "state action" for the purposes of the Fourteenth Amendment. 323 F. 2d, at 967. It was unnecessary, of course, to create a Title VI private action against private discriminators where they were already within the reach of existing private remedies. But when they were not—and *Simkins* carefully disclaimed holding that "every subvention by the federal or state government automatically involves the beneficiary in 'state action,' " *ibid.*[3]—it is difficult

[3] This Court has never held that the mere receipt of federal or state funds is sufficient to make the recipient a federal or state actor. In *Norwood* v. *Harrison*, 413 U. S. 455 (1973), private schools that received state aid were held subject to the Fourteenth Amendment's ban on discrimination, but the Court's test required "tangible financial aid" with a "significant tendency to facilitate, reinforce, and support private discrimination." *Id.*, at 466. The mandate of *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961), to sift facts and weigh circumstances of governmental support in each case to determine whether private or state action was involved, has not been abandoned for an automatic rule based on receipt of funds.

Contemporaneous with the congressional debates on the Civil Rights Act was this Court's decision in *Griffin* v. *School Board*, 377 U. S. 218 (1964). Tuition grants and tax concessions were provided for parents of students in private schools, which discriminated racially. The Court found sufficient state action, but carefully limited its holding to the circumstances presented: "[C]losing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws." *Id.*, at 232.

Hence, neither at the time of the enactment of Title VI, nor at the present time to the extent this Court has spoken, has mere receipt of

to believe that Congress *silently* created a *private* remedy to terminate conduct that previously had been entirely beyond the reach of federal law.

For those who believe, contrary to my views, that Title VI was intended to create a stricter standard of color blindness than the Constitution itself requires, the result of no private cause of action follows even more readily. In that case Congress must be seen to have banned degrees of discrimination, as well as types of discriminators, not previously reached by law. A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III and IV) would not leave for inference a vast new extension of private enforcement power. And a Congress so exceptionally concerned with the satisfaction of procedural preliminaries before confronting fund recipients with the choice of a cutoff or of stopping discriminating would not permit private parties to pose precisely that same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.

Significantly, in at least three instances legislators who played a major role in the passage of Title VI explicitly stated that a private right of action under Title VI does not exist.[4]

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state funds created state action. Moreover, *Simkins* has not met with universal approval among the United States Courts of Appeals. See cases cited in *Greco* v. *Orange Memorial Hospital Corp.*, 423 U. S. 1000, 1004 (1975) (WHITE, J., dissenting from denial of certiorari).

[4] "Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong. Rec. 2467 (1964) (Rep. Gill).

"[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." *Id.*, at 6562 (Sen. Kuchel).

"Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of

As an "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," *Cort* v. *Ash*, 422 U. S., at 78, clearer statements cannot be imagined, and under *Cort*, "an explicit purpose to *deny* such cause of action [is] controlling." *Id.*, at 82. Senator Keating, for example, proposed a private "right to sue" for the "person suffering from discrimination"; but the Department of Justice refused to include it, and the Senator acquiesced.[5] These are not neutral, ambiguous statements. They indicate the absence of a legislative intent to create a private remedy. Nor do any of these statements make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as MR. JUSTICE STEVENS and the three Justices who join his opinion apparently would. See *post*, at 419–420, n. 26. Indeed, it would be odd if they did, since the practical effect of either type of private cause of action would be identical. If private suits to enjoin conduct allegedly violative of § 601 were permitted, recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of Title VI or refusing federal funds and thereby escaping from the statute's jurisdictional predicate.[6] This is precisely the same choice as would confront recipients if suit were brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law.

Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill. However, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department." *Id.*, at 7065 (Sen. Keating).

[5] *Ibid.*

[6] As Senator Ribicoff stated: "Sometimes those eligible for Federal assistance may elect to reject such aid, unwilling to agree to a nondiscrimination requirement. If they choose that course, the responsibility is theirs." *Id.*, at 7067.

This Court has always required "that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U. S. 453, 458 (1974). See also *Securities Investor Protection Corp.* v. *Barbour,* 421 U. S. 412, 418–420 (1975). A private cause of action under Title VI is unable to satisfy either prong of this test.

Because each of my colleagues either has a different view or assumes a private cause of action, however, the merits of the Title VI issue must be addressed. My views in that regard, as well as my views with respect to the equal protection issue, are included in the joint opinion that my Brothers BRENNAN, MARSHALL, and BLACKMUN and I have filed.[7]

MR. JUSTICE MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

I

A

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor,

[7] I also join Parts I, III–A, and V–C of MR. JUSTICE POWELL's opinion.

the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.[1]

The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that

> "[h]e has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither." Franklin 88.

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a

[1] The history recounted here is perhaps too well known to require documentation. But I must acknowledge the authorities on which I rely in retelling it. J. Franklin, From Slavery to Freedom (4th ed. 1974) (hereinafter Franklin); R. Kluger, Simple Justice (1975) (hereinafter Kluger); C. Woodward, The Strange Career of Jim Crow (3d ed. 1974) (hereinafter Woodward).

course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art. I, § 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, Art. I, § 9, and a fugitive slave clause requiring that when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, § 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed, Americans "proudly accepted the challenge and responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks." Franklin 100.

The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in *Dred Scott* v. *Sandford*, 19 How. 393 (1857), holding that the Missouri Compromise—which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri—was unconstitutional because it deprived slave owners of their property without due process. The Court declared that under the Constitution a slave was property, and "[t]he right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United

States . . . ." *Id.*, at 451. The Court further concluded that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ." *Id.*, at 407.

B

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." *Slaughter-House Cases*, 16 Wall. 36, 70 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed

in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." Woodward 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. See, *e. g., Slaughter-House Cases, supra; United States* v. *Reese,* 92 U. S. 214 (1876); *United States* v. *Cruikshank,* 92 U. S. 542 (1876). Then in the notorious *Civil Rights Cases,* 109 U. S. 3 (1883), the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theatres and other places of public amusement." *Id.,* at 10. According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. *Id.,* at 24–25. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that

state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . ." *Id.*, at 25. As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race . . .—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61.

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896). In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.*, at 544. Ignoring totally the realities of the positions of the two races, the Court remarked:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*, at 551.

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560. He expressed his fear that if like laws were enacted in other

States, "the effect would be in the highest degree mischievous." *Id.*, at 563. Although slavery would have disappeared, the States would retain the power "to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens . . . ." *Ibid.*

The fears of Mr. Justice Harlan were soon to be realized. In the wake of *Plessy*, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after *Plessy*, the Charlestown News and Courier printed a parody of Jim Crow laws:

> " 'If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for colored witnesses to kiss.' " Woodward 68.

The irony is that before many years had passed, with the exception of the Jim Crow witness stand, "all the improbable applications of the principle suggested by the editor in derision had been put into practice—down to and including the Jim Crow Bible." *Id.*, at 69.

Nor were the laws restricting the rights of Negroes limited

solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was " 'not humiliating but a benefit' " and that he was " 'rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against.' " Kluger 91.

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established. It is of course true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to *Brown* v. *Board of Education*, 347 U. S. 483 (1954). See, *e. g.*, *Morgan* v. *Virginia*, 328 U. S. 373 (1946); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950). Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child.[2] The Negro child's mother is over three times more likely to die of complications in childbirth,[3] and the infant mortality rate for Negroes is nearly twice that for whites.[4] The median income of the Negro family is only 60% that of the median of a white family,[5] and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.[6]

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites,[7] and the unemployment rate for Negro teenagers is nearly three times that of white teenagers.[8] A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma.[9] Although Negroes

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[2] U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 65 (1977) (Table 94).

[3] *Id.*, at 70 (Table 102).

[4] *Ibid.*

[5] U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P–60, No. 107, p. 7 (1977) (Table 1).

[6] Id., at 20 (Table 14).

[7] U. S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, January 1978, p. 170 (Table 44).

[8] *Ibid.*

[9] U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P–60, No. 105, p. 198 (1977) (Table 47).

represent 11.5% of the population,[10] they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.[11]

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that

> "in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy . . . ." *Slaughter-House Cases*, 16 Wall., at 72.

It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the

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[10] U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract, *supra*, at 25 (Table 24).

[11] *Id.*, at 407–408 (Table 662) (based on 1970 census).

Nation's past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. Act of July 16, 1866, ch. 200, 14 Stat. 173; see *supra*, at 391. Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, 14 Stat. 174; see also Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen, and to the exclusion of all other persons . . . ." Cong. Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). See also *id.*, at 634–635 (remarks of Rep. Ritter); *id.*, at App. 78, 80–81 (remarks of Rep. Chanler). Indeed, the bill was bitterly opposed on the ground that it "undertakes to make the negro in some respects . . . superior . . . and gives them favors that the poor white boy in the North cannot get." *Id.*, at 401 (remarks of Sen. McDougall). See also *id.*, at 319 (remarks of Sen. Hendricks); *id.*, at 362 (remarks of Sen. Saulsbury); *id.*, at 397 (remarks of Sen. Willey); *id.*, at 544 (remarks of Rep. Taylor). The bill's supporters defended it—not by rebutting the claim of special treatment—but by pointing to the need for such treatment:

> "The very discrimination it makes between 'destitute and suffering' negroes, and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." *Id.*, at App. 75 (remarks of Rep. Phelps).

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. *Id.*, at 421, 688. President Johnson vetoed this bill and also a subsequent bill that contained some modifications; one of his prin-

cipal objections to both bills was that they gave special benefits to Negroes. 8 Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1897). Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. Cong. Globe, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 94 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

B

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school-assignment decisions. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971); *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971). We noted, moreover, that a

> "flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of

> racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green* v. *County School Board*, 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy." *Board of Education* v. *Swann*, 402 U. S. 43, 46 (1971).

As we have observed, "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel* v. *Barresi*, *supra*, at 41.

Only last Term, in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in *UJO* to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In another case last Term, *Califano* v. *Webster*, 430 U. S. 313 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was " 'the permissible one of redressing our society's longstanding disparate treatment of women.' " *Id.*, at 317, quoting *Califano* v. *Goldfarb*, 430 U. S. 199, 209 n. 8 (1977) (plurality opinion). We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination.[12] It is true that

[12] Indeed, the action of the University finds support in the regulations promulgated under Title VI by the Department of Health, Education, and Welfare and approved by the President, which authorize a federally funded institution to take affirmative steps to overcome past discrimination against

in both *UJO* and *Webster* the use of the disfavored classification was predicated on legislative or administrative action, but in neither case had those bodies made findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. Rather, the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.

IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has

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groups even where the institution was not guilty of prior discrimination. 45 CFR § 80.3 (b)(6)(ii) (1977).

not been realized for the Negro; because of his skin color he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases, supra,* the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U. S., at 25; see *supra,* at 392. We cannot in light of the history of the last century yield to that view. Had the Court in that decision and others been willing to "do for human liberty and the fundamental rights of American citizenship, what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," 109 U. S., at 53 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Most importantly, had the Court been willing in 1896, in *Plessy* v. *Ferguson,* to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is color-blind" appeared only in the opinion of the lone dissenter. 163 U. S., at 559. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown* v. *Board of Education,* ours was a Nation where, *by law,* an individual could be given "special" treatment based on the color of his skin.

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing

to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take "'*affirmative action* to overcome the effects of conditions which resulted in limiting participation . . . by persons of a particular race, color, or national origin.'" Supplemental Brief for United States as *Amicus Curiae* 16 (emphasis added). I cannot even guess the number of state and local governments that have set up affirmative-action programs, which may be affected by today's decision.

I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy* v. *Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown* v. *Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. *Now*, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.

MR. JUSTICE BLACKMUN.

I participate fully, of course, in the opinion, *ante*, p. 324, that bears the names of my Brothers BRENNAN, WHITE, MARSHALL, and myself. I add only some general observations that hold particular significance for me, and then a few comments on equal protection.

I

At least until the early 1970's, apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students in the United States were members of what we now refer to as minority groups. In addition, approximately three-fourths of our Negro physicians were trained at only two medical schools. If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious.

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

The number of qualified, indeed highly qualified, applicants for admission to existing medical schools in the United States far exceeds the number of places available. Wholly apart from racial and ethnic considerations, therefore, the selection process inevitably results in the denial of admission to many *qualified* persons, indeed, to far more than the number of those who are granted admission. Obviously, it is a denial to the deserving. This inescapable fact is brought into sharp focus here because Allan Bakke is not himself charged with discrimination and yet is the one who is disadvantaged, and because the Medical School of the University of California at Davis itself is not charged with historical discrimination.

One theoretical solution to the need for more minority

members in higher education would be to enlarge our graduate schools. Then all who desired and were qualified could enter, and talk of discrimination would vanish. Unfortunately, this is neither feasible nor realistic. The vast resources that apparently would be required simply are not available. And the need for more professional graduates, in the strict numerical sense, perhaps has not been demonstrated at all.

There is no particular or real significance in the 84–16 division at Davis. The same theoretical, philosophical, social, legal, and constitutional considerations would necessarily apply to the case if Davis' special admissions program had focused on any lesser number, that is, on 12 or 8 or 4 places or, indeed, on only 1.

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this. The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds. For me, therefore, interference by the judiciary must be the rare exception and not the rule.

II

I, of course, accept the propositions that (a) Fourteenth Amendment rights are personal; (b) racial and ethnic distinc-

tions where they are stereotypes are inherently suspect and call for exacting judicial scrutiny; (c) academic freedom is a special concern of the First Amendment; and (d) the Fourteenth Amendment has expanded beyond its original 1868 concept and now is recognized to have reached a point where, as MR. JUSTICE POWELL states, *ante*, at 293, quoting from the Court's opinion in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 296 (1976), it embraces a "broader principle."

This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

I emphasize in particular that the decided cases are not easily to be brushed aside. Many, of course, are not precisely on point, but neither are they off point. Racial factors have been given consideration in the school desegregation cases, in the employment cases, in *Lau* v. *Nichols*, 414 U. S. 563 (1974), and in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977). To be sure, some of these may be "distinguished" on the ground that victimization was directly present. But who is to say that victimization is not present for some members of today's minority groups, although it is of a lesser and perhaps different degree. The petitioners in *United Jewish Organizations* certainly complained bitterly of their reapportionment treatment, and I rather doubt that they regard the "remedy" there imposed as one that was "to improve" the group's ability to participate, as MR. JUSTICE POWELL describes it, *ante*, at 305. And surely in *Lau* v. *Nichols* we looked to ethnicity.

I am not convinced, as MR. JUSTICE POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work. Because of my conviction that admission programs are primarily for the educators, I am willing to accept the representation that the Harvard program is one where good faith in its administration is practiced as well as professed. I agree that such a program, where race or ethnic background is only one of many factors, is a program better formulated than Davis' two-track system. The cynical, of course, may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly. I need not go that far, for despite its two-track aspect, the Davis program, for me, is within constitutional bounds, though perhaps barely so. It is surely free of stigma, and, as in *United Jewish Organizations*, I am not willing to infer a constitutional violation.

It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs. We may excuse some of these on the ground that they have specific constitutional protection or, as with Indians, that those benefited are wards of the Government. Nevertheless, these preferences exist and may not be ignored. And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.

I add these only as additional components on the edges of the central question as to which I join my Brothers BRENNAN, WHITE, and MARSHALL in our more general approach. It is gratifying to know that the Court at least finds it constitutional for an academic institution to take race and ethnic background into consideration as one factor, among many, in

the administration of its admissions program. I presume that that factor always has been there, though perhaps not conceded or even admitted. It is a fact of life, however, and a part of the real world of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.

So the ultimate question, as it was at the beginning of this litigation, is: Among the qualified, how does one choose?

A long time ago, as time is measured for this Nation, a Chief Justice, both wise and farsighted, said:

> "In considering this question, then, we must never forget, that it is *a constitution* we are expounding." *McCulloch* v. *Maryland,* 4 Wheat. 316, 407 (1819) (emphasis in original).

In the same opinion, the Great Chief Justice further observed:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.,* at 421.

More recently, one destined to become a Justice of this Court observed:

> "The great generalities of the constitution have a content and a significance that vary from age to age." B. Cardozo, The Nature of the Judicial Process 17 (1921).

And an educator who became a President of the United States said:

> "But the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age." W. Wilson, Constitutional Government in the United States 69 (1911).

These precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law. Today, again, we are expounding a *Constitution*. The same principles that governed McCulloch's case in 1819 govern Bakke's case in 1978. There can be no other answer.

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in the judgment in part and dissenting in part.

It is always important at the outset to focus precisely on the controversy before the Court.[1] It is particularly important to do so in this case because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* The California Supreme Court upheld his challenge and ordered him admitted. If the

[1] Four Members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. See opinion of JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, *ante*, at 324–325. It is hardly necessary to state that only a majority can speak for the Court or determine what is the "central meaning" of any judgment of the Court.

state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully excluded from the Medical School because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court.

The judgment as originally entered by the trial court contained four separate paragraphs, two of which are of critical importance.[2] Paragraph 3 declared that the University's special admissions program violated the Fourteenth Amendment, the State Constitution, and Title VI. The trial court did not order the University to admit Bakke because it concluded that Bakke had not shown that he would have been admitted if there had been no special program. Instead, in paragraph 2 of its judgment it ordered the University to consider Bakke's application for admission without regard to his race or the race of any other applicant. The order did not include any broad

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[2] The judgment first entered by the trial court read, in its entirety, as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

"1. Defendant, the Regents of the University of California, have judgment against plaintiff, Allan Bakke, denying the mandatory injunction requested by plaintiff ordering his admission to the University of California at Davis Medical School;

"2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission;

"3. Cross-defendant Allan Bakke have judgment against cross-complainant, the Regents of the University of California, declaring that the special admissions program at the University of California at Davis Medical School violates the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U. S. C. § 2000d];

"4. That plaintiff have and recover his court costs incurred herein in the sum of $217.35." App. to Pet. for Cert. 120a.

prohibition against any use of race in the admissions process; its terms were clearly limited to the University's consideration of *Bakke's* application.[3] Because the University has since been ordered to admit Bakke, paragraph 2 of the trial court's order no longer has any significance.

The California Supreme Court, in a holding that is not challenged, ruled that the trial court incorrectly placed the burden on Bakke of showing that he would have been admitted in the absence of discrimination. The University then conceded "that it [could] not meet the burden of proving that the special admissions program did not result in Mr. Bakke's failure to be admitted."[4] Accordingly, the California Supreme Court directed the trial court to enter judgment ordering Bakke's admission.[5] Since that order superseded para-

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[3] In paragraph 2 the trial court ordered that "plaintiff [Bakke] is entitled to have *his* application for admission to the medical school considered without regard to *his* race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering *plaintiff's* race or the race of any other applicant in passing upon *his* application for admission." See n. 2, *supra* (emphasis added). The only way in which this order can be broadly read as prohibiting any use of race in the admissions process, apart from Bakke's application, is if the final "his" refers to "any other applicant." But the consistent use of the pronoun throughout the paragraph to refer to Bakke makes such a reading entirely unpersuasive, as does the failure of the trial court to suggest that it was issuing relief to applicants who were not parties to the suit.

[4] Appendix B to Application for Stay A19–A20.

[5] 18 Cal. 3d 34, 64, 553 P. 2d 1152, 1172 (1976). The judgment of the Supreme Court of the State of California affirms only paragraph 3 of the trial court's judgment. The Supreme Court's judgment reads as follows:

"IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court[,] County of Yolo[,] in the above-entitled cause, is hereby affirmed insofar as it determines that the special admission program is invalid; the judgment is reversed insofar as it denies Bakke an injunction ordering that he be admitted to the University, and the trial court is directed to enter judgment ordering Bakke to be admitted.

"Bakke shall recover his costs on these appeals."

graph 2 of the trial court's judgment, there is no outstanding injunction forbidding any consideration of racial criteria in processing applications.

It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.[6]

II

Both petitioner and respondent have asked us to determine the legality of the University's special admissions program by reference to the Constitution. Our settled practice, however, is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101, 105.[7] The more important the issue, the more force

[6] "This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories,* 351 U. S. 292, 297.

[7] "From *Hayburn's Case,* 2 Dall. 409, to *Alma Motor Co.* v. *Timken-Detroit Axle Co.* [, 329 U. S. 129,] and the Hatch Act case [*United Public Workers* v. *Mitchell,* 330 U. S. 75] decided this term, this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U. S. Const., Art. III. . . .

"The policy, however, has not been limited to jurisdictional determinations. For, in addition, 'the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents

there is to this doctrine.[8] In this case, we are presented with a constitutional question of undoubted and unusual importance. Since, however, a dispositive statutory claim was raised at the very inception of this case, and squarely decided in the portion of the trial court judgment affirmed by the California Supreme Court, it is our plain duty to confront it. Only if petitioner should prevail on the statutory issue would it be necessary to decide whether the University's admissions program violated the Equal Protection Clause of the Fourteenth Amendment.

III

Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d, provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance.[9] The plain language of the statute therefore requires affirmance of the judgment below. A different result

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some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided." *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–569 (footnotes omitted). See also *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (Brandeis, J., concurring).

[8] The doctrine reflects both our respect for the Constitution as an enduring set of principles and the deference we owe to the Legislative and Executive Branches of Government in developing solutions to complex social problems. See A. Bickel, The Least Dangerous Branch 131 (1962).

[9] Record 29.

cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted.

Title VI is an integral part of the far-reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action" programs. Its attention was focused on the problem at hand, the "glaring . . . discrimination against Negroes which exists throughout our Nation," [10] and, with respect to Title VI, the federal funding of segregated facilities.[11] The genesis of the legislation, however, did not limit the breadth of the solution adopted. Just as Congress responded to the problem of employment discrimination by enacting a provision that protects all races, see *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 279,[12] so, too, its answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of *any* individual from a federally funded program "on the ground of race." In the words of the House Report, Title VI stands for "the general principle that *no person* . . . be excluded from participation . . . on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance." H. R. Rep. No. 914, 88th

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[10] H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963).

[11] It is apparent from the legislative history that the immediate object of Title VI was to prevent federal funding of segregated facilities. See, *e. g.*, 110 Cong. Rec. 1521 (1964) (remarks of Rep. Celler); *id.*, at 6544 (remarks of Sen. Humphrey).

[12] In *McDonald* v. *Santa Fe Trail Transp. Co.*, the Court held that "Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standards as would be applicable were they Negroes . . . ." 427 U. S., at 280. Quoting from our earlier decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431, the Court reaffirmed the principle that the statute "prohibit[s] '[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*.'" 427 U. S., at 279 (emphasis in original).

Cong., 1st Sess., pt. 1, p. 25 (1963) (emphasis added). This same broad view of Title VI and § 601 was echoed throughout the congressional debate and was stressed by every one of the major spokesmen for the Act.[13]

Petitioner contends, however, that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of "exclusion" is justified by the statute or its history. The language of the entire section is perfectly clear; the words that follow "excluded from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds.

The legislative history reinforces this reading. The only suggestion that § 601 would allow exclusion of nonminority applicants came from opponents of the legislation and then only by way of a discussion of the meaning of the word "discrimination." [14] The opponents feared that the term "dis-

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[13] See, *e. g.*, 110 Cong. Rec. 1520 (1964) (remarks of Rep. Celler); *id.*, at 5864 (remarks of Sen. Humphrey); *id.*, at 6561 (remarks of Sen. Kuchel); *id.*, at 7055 (remarks of Sen. Pastore). (Representative Celler and Senators Humphrey and Kuchel were the House and Senate floor managers for the entire Civil Rights Act, and Senator Pastore was the majority Senate floor manager for Title VI.)

[14] Representative Abernethy's comments were typical:

"Title VI has been aptly described as the most harsh and unprecedented proposal contained in the bill . . . .

"It is aimed toward eliminating discrimination in federally assisted programs. It contains no guideposts and no yardsticks as to what might constitute discrimination in carrying out federally aided programs and projects. . . .

. . . . . .

"Presumably the college would have to have a 'racially balanced' staff from the dean's office to the cafeteria. . . .

"The effect of this title, if enacted into law, will interject race as a factor in every decision involving the selection of an individual . . . . The concept of 'racial imbalance' would hover like a black cloud over every transaction . . . ." *Id.*, at 1619. See also, *e. g.*, *id.*, at 5611–5613 (remarks of Sen. Ervin); *id.*, at 9083 (remarks of Sen. Gore).

crimination" would be read as mandating racial quotas and "racially balanced" colleges and universities, and they pressed for a specific definition of the term in order to avoid this possibility.[15] In response, the proponents of the legislation gave repeated assurances that the Act would be "colorblind" in its application.[16] Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:

> "[T]he word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . .
>
> "The answer to this question [what was meant by 'discrimination'] is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored people do not have to pay taxes, or that they can pay their taxes 6 months later than everyone else." 110 Cong. Rec. 5864 (1964).
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> "[I]f we started to treat Americans as Americans, not as fat ones, thin ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that we would not need to worry about discrimination." *Id.*, at 5866.

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[15] *E. g., id.*, at 5863, 5874 (remarks of Sen. Eastland).

[16] See, *e. g., id.*, at 8346 (remarks of Sen. Proxmire) ("Taxes are collected from whites and Negroes, and they should be expended without discrimination"); *id.*, at 7055 (remarks of Sen. Pastore) ("[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind"); and *id.*, at 6543 (remarks of Sen. Humphrey) ("'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination'") (quoting from President Kennedy's Message to Congress, June 19, 1963).

In giving answers such as these, it seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government,[17] but that does not mean that the legislation only codifies an existing constitutional prohibition. The statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require. The Act's proponents plainly considered Title VI consistent with their view of the Constitution and they sought to provide an effective weapon to implement that view.[18] As a distillation of what the supporters of the Act believed the Constitution demanded of State and Federal Governments, § 601 has independent force, with language and emphasis in addition to that found in the Constitution.[19]

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[17] See, e. g., 110 Cong. Rec. 5253 (1964) (remarks of Sen. Humphrey); and *id.*, at 7102 (remarks of Sen. Javits). The parallel between the prohibitions of Title VI and those of the Constitution was clearest with respect to the immediate goal of the Act—an end to federal funding of "separate but equal" facilities.

[18] "As in *Monroe* [v. *Pape*, 365 U. S. 167], we have no occasion here to 'reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.' 365 U. S., at 191. For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did in fact act, see *Ries* v. *Lynskey*, 452 F. 2d, at 175." *Moor* v. *County of Alameda*, 411 U. S. 693, 709.

[19] Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose. See *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 709 ("[T]he basic policy of the statute [Title VII] requires that we focus on fairness to individuals rather than fairness

As with other provisions of the Civil Rights Act, Congress' expression of its policy to end racial discrimination may independently proscribe conduct that the Constitution does not.[20] However, we need not decide the congruence—or lack of congruence—of the controlling statute and the Constitution

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to classes"). This same principle of *individual* fairness is embodied in Title VI.

"The basic fairness of title VI is so clear that I find it difficult to understand why it should create any opposition. . . .

. . . . . .

"Private prejudices, to be sure, cannot be eliminated overnight. However, there is one area where no room at all exists for private prejudices. That is the area of governmental conduct. As the first Mr. Justice Harlan said in his prophetic dissenting opinion in *Plessy* v. *Ferguson*, 163 U. S. 537, 559:

" 'Our Constitution is color-blind.'

"So—I say to Senators—must be our Government. . . .

"Title VI closes the gap between our purposes as a democracy and our prejudices as individuals. The cuts of prejudice need healing. The costs of prejudice need understanding. We cannot have hostility between two great parts of our people without tragic loss in our human values . . . .

"Title VI offers a place for the meeting of our minds as to Federal money." 110 Cong. Rec. 7063–7064 (1964) (remarks of Sen. Pastore).

Of course, one of the reasons marshaled in support of the conclusion that Title VI was "noncontroversial" was that its prohibition was already reflected in the law. See *ibid.* (remarks of Sen. Pell and Sen. Pastore).

[20] For example, private employers now under duties imposed by Title VII were wholly free from the restraints imposed by the Fifth and Fourteenth Amendments which are directed only to governmental action.

In *Lau* v. *Nichols*, 414 U. S. 563, the Government's brief stressed that "the applicability of Title VI . . . does not depend upon the outcome of the equal protection analysis. . . . [T]he statute independently proscribes the conduct challenged by petitioners and provides a discrete basis for injunctive relief." Brief for United States as *Amicus Curiae*, O. T. 1973, No. 72–6520, p. 15. The Court, in turn, rested its decision on Title VI. MR. JUSTICE POWELL takes pains to distinguish *Lau* from the case at hand because the *Lau* decision "rested solely on the statute." *Ante*, at 304. See also *Washington* v. *Davis*, 426 U. S. 229, 238–239; *Allen* v. *State Board of Elections*, 393 U. S. 544, 588 (Harlan, J., concurring and dissenting).

since the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program.

In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. We are dealing with a distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage.[21] In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race.[22] As succinctly phrased during the Senate debate, under Title VI it is not "permissible to say 'yes' to one person; but to say 'no' to another person, only because of the color of his skin." [23]

Belatedly, however, petitioner argues that Title VI cannot be enforced by a private litigant. The claim is unpersuasive in the context of this case. Bakke requested injunctive and declaratory relief under Title VI; petitioner itself then joined

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[21] As explained by Senator Humphrey, § 601 expresses a principle imbedded in the constitutional *and* moral understanding of the times.

"The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. *In many instances* the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. . . . *In all cases*, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong. Rec. 6544 (1964) (emphasis added).

[22] Petitioner's attempt to rely on regulations issued by HEW for a contrary reading of the statute is unpersuasive. Where no discriminatory policy was in effect, HEW's example of permissible "affirmative action" refers to "special recruitment policies." 45 CFR § 80.5 (j) (1977). This regulation, which was adopted in 1973, sheds no light on the legality of the admissions program that excluded Bakke in this case.

[23] 110 Cong. Rec. 6047 (1964) (remarks of Sen. Pastore).

issue on the question of the legality of its program under Title VI by asking for a declaratory judgment that it was in compliance with the statute.[24] Its view during state-court litigation was that a private cause of action does exist under Title VI. Because petitioner questions the availability of a private cause of action for the first time in this Court, the question is not properly before us. See *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434, Even if it were, petitioner's original assumption is in accord with the federal courts' consistent interpretation of the Act. To date, the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI.[25] The United States has taken the same position; in its *amicus curiae* brief directed to this specific issue, it concluded that such a remedy is clearly available,[26]

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[24] Record 30–31.

[25] See, *e. g.*, *Lau* v. *Nichols*, *supra*; *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (CA5 1967), cert. denied, 388 U. S. 911; *Uzzell* v. *Friday*, 547 F. 2d 801 (CA4 1977), opinion on rehearing en banc, 558 F. 2d 727, cert. pending, No. 77–635; *Serna* v. *Portales*, 499 F. 2d 1147 (CA10 1974); cf. *Chambers* v. *Omaha Public School District*, 536 F. 2d 222, 225 n. 2 (CA8 1976) (indicating doubt over whether a *money judgment* can be obtained under Title VI). Indeed, the Government's brief in *Lau* v. *Nichols*, *supra*, succinctly expressed this common assumption: "It is settled that petitioners . . . have standing to enforce Section 601 . . . ." Brief for United States as *Amicus Curiae* in *Lau* v. *Nichols*, O. T. 1973, No. 72–6520, p. 13 n. 5.

[26] Supplemental Brief for United States as *Amicus Curiae* 24–34. The Government's supplemental brief also suggests that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds. *Id.*, at 28–30. Section 601 is specifically addressed to personal rights, while § 602—the fund cutoff provision—establishes "an elaborate mechanism for *governmental* enforcement by federal agencies." Supplemental Brief, *supra*, at 28 (emphasis added). Arguably, private enforcement of this "elaborate mechanism" would not fit within the congressional scheme, see separate opinion of MR. JUSTICE WHITE, *ante*, at 380–383. But Bakke did not seek to cut off the University's federal funding; he sought admission

and Congress has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private action.[27] The conclusion that an individual may maintain a private cause of action is amply supported in the legislative history of Title VI itself.[28] In short, a fair consideration of

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to medical school. The difference between these two courses of action is clear and significant. As the Government itself states:

"[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602 . . . . A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602." Supplemental Brief, *supra*, at 30 n. 25.

The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See *Rosado* v. *Wyman*, 397 U. S. 397, 420.

[27] See 29 U. S. C. § 794 (1976 ed.) (the Rehabilitation Act of 1973) (in particular, the legislative history discussed in *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277, 1285–1286 (CA7 1977)); 20 U. S. C. § 1617 (1976 ed.) (attorney fees under the Emergency School Aid Act); and 31 U. S. C. § 1244 (1976 ed.) (private action under the Financial Assistance Act). Of course, none of these subsequent legislative enactments is necessarily reliable evidence of Congress' intent in 1964 in enacting Title VI, and the legislation was not intended to change the existing status of Title VI.

[28] Framing the analysis in terms of the four-part *Cort* v. *Ash* test, see 422 U. S. 66, 78, it is clear that all four parts of the test are satisfied. (1) Bakke's status as a potential beneficiary of a federally funded program definitely brings him within the "'class for whose *especial* benefit the statute was enacted,'" *ibid.* (emphasis in original). (2) A cause of action based on race discrimination has not been "traditionally relegated to state law." *Ibid.* (3) While a few excerpts from the voluminous legislative history suggest that Congress did not intend to create a private cause of action, see opinion of MR. JUSTICE POWELL, *ante*, at 283 n. 18, an examination of the entire legislative history makes it clear that Congress had no intention to foreclose a private right of action. (4) There is ample evidence that Congress considered private causes of action to be consistent

petitioner's tardy attack on the propriety of Bakke's suit under Title VI requires that it be rejected.

The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the Medical School because of his race. It is therefore our duty to affirm the judgment ordering Bakke admitted to the University.

Accordingly, I concur in the Court's judgment insofar as it affirms the judgment of the Supreme Court of California. To the extent that it purports to do anything else, I respectfully dissent.

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with, if not essential to, the legislative scheme. See, *e. g.*, remarks of Senator Ribicoff:

"We come then to the crux of the dispute—how this right [to participate in federally funded programs without discrimination] should be protected. And even this issue becomes clear upon the most elementary analysis. If Federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies must fall into one of two categories: First, action to end discrimination; or second, action to end the payment of funds. Obviously action to end discrimination is preferable since that reaches the objective of extending the funds on a nondiscriminatory basis. But if the discrimination persists and cannot be effectively terminated, how else can the principle of nondiscrimination be vindicated except by nonpayment of funds?" 110 Cong. Rec. 7065 (1964). See also *id.*, at 5090, 6543, 6544 (remarks of Sen. Humphrey); *id.*, at 7103, 12719 (remarks of Sen. Javits); *id.*, at 7062, 7063 (remarks of Sen. Pastore).

The congressional debates thus show a clear understanding that the principle embodied in § 601 involves *personal* federal rights that administrative procedures would not, for the most part, be able to protect. The analogy to the Voting Rights Act of 1965, 42 U. S. C. § 1973 *et seq.* (1970 ed. and Supp. V), is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. See *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 556. In *Allen*, of course, this Court found a private right of action under the Voting Rights Act.

UNITED STATES *v.* UNITED STATES GYPSUM CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76–1560. Argued March 1, 1978—Decided June 29, 1978

Several major gypsum board manufacturers and various of their officials were indicted for violations of § 1 of the Sherman Act by allegedly engaging in a price-fixing conspiracy. One of the types of actions allegedly taken in formulating and effectuating the conspiracy was interseller price verification, *i. e.*, the practice of telephoning a competing manufacturer to determine the price being currently offered on gypsum board to a specific customer. After some of the defendants pleaded *nolo contendere* and were sentenced, the remaining defendants were convicted after a trial of some 19 weeks. The Government's case focused on the interseller price-verification charge, which the defendants defended on the ground that the price-information exchanges were to enable them to take advantage of the meeting-competition defense contained in § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act (which permits a seller to rebut a prima facie price-discrimination charge by showing that a lower price to a purchaser was made in good faith to meet an equally low price of a competitor). On the verification issue, the trial judge charged the jury that if the price-information exchanges were found to have been undertaken in good faith to comply with the Robinson-Patman Act, verification alone would not suffice to establish an illegal price-fixing agreement, but that if the jury found that the effect of verification was to fix prices, then the parties would be presumed, as a matter of law, to have intended that result. The judge further charged that since only a single conspiracy was alleged, liability could only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy alleged, the judge having refused the defendants' requested charge directing the jury to determine what kind of agreement, if any, existed as to each defendant before any could be found to be a member of the conspiracy. With respect to the defendants' evidence as to withdrawal from the conspiracy, the judge instructed the jury that withdrawal had to be established by either affirmative notice to every other member of the conspiracy or by disclosure of the illegal enterprise to law enforcement officials. The judge

refused the defendants' requested instruction that vigorous price competition during the period in question could also be considered as evidence of abandonment of the conspiracy. After all the testimony had been presented, the jurors were sequestered for deliberation, and apparently disagreement among them arose. After approximately seven days of deliberations, the foreman of the jury informed the judge that he wanted to discuss the jury's condition, and this resulted, with the parties' consent, in an *ex parte* meeting between the judge and the foreman. Most of the discussion at the meeting involved the jurors' deteriorating health but the foreman also referred to the jury's deadlock; there followed an exchange strongly suggesting that the foreman may have carried away from the meeting the impression that the judge wanted a verdict "one way or the other." The jury rendered its guilty verdict the following morning. The Court of Appeals reversed the convictions on various grounds, holding, *inter alia*, that verification of price concessions with competitors for the sole purpose of taking advantage of the meeting-competition defense of § 2 (b) constitutes a "controlling circumstance" precluding liability under § 1 of the Sherman Act, and thus an instruction allowing the jury to ignore the defendants' purpose in engaging in the alleged misconduct could not be sustained. *Held:*

1. A defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. Since the trial judge's instruction on the verification issue had this prohibited effect, it was improper. Pp. 434–446.

(a) The Sherman Act is not to be construed as mandating a regime of strict-liability crimes; rather the criminal offenses defined therein are to be construed as including intent as an element. Pp. 436–443.

(b) Action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent. Pp. 443–446.

2. A good-faith belief, rather than an absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor suffices to invoke the § 2 (b) defense; exchanges of price information, even when putatively for the purpose of Robinson-Patman Act compliance, must remain subject to close scrutiny under the Sher-

man Act. Therefore, the Court of Appeals erred in treating interseller price verification even as a limited "controlling circumstance" exception precluding Sherman Act liability. Pp. 447–459.

3. The *ex parte* meeting between the trial judge and the jury foreman was improper, and the Court of Appeals would have been justified in reversing the convictions solely because of the risk that the foreman believed the judge was insisting on a dispositive verdict. Such a meeting is pregnant with possibilities for error, since it is difficult to contain, much less to anticipate, the direction the conversation will take at such a meeting, any occasion which leads to communication with the whole jury panel through one juror inevitably risks innocent misstatements of the law and misinterpretations despite the undisputed good faith of the participants, and the absence of counsel from the meeting aggravates the problems of having one juror serve as a conduit for communication with the whole panel. Here the meeting was allowed to drift into a supplemental instruction relating to the jury's obligation to reach a verdict, and counsel were denied any chance to correct whatever mistaken impression the foreman might have taken from the meeting. Pp. 459–462.

4. The trial judge's charge concerning participation in the conspiracy, although perhaps not completely clear, was sufficient, but his charge on withdrawal from the conspiracy was erroneous, since it limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal, rather than permitting consideration of any affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators. Pp. 462–465.

550 F. 2d 115, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, and WHITE, JJ., joined; in all but Part IV of which STEWART, J., joined; in Parts I, II, V, and a portion of Part III of which POWELL, J., joined; in Part I and a portion of Part V of which REHNQUIST, J., joined; and in all but Part II of which STEVENS, J., joined. POWELL, J., filed an opinion concurring in part, *post*, p. 469. REHNQUIST, J., *post*, p. 471, and STEVENS, J., *post*, p. 474, filed opinions concurring in part and dissenting in part. BLACKMUN, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the briefs were *Solicitor*

General McCree, Assistant Attorney General Shenefield, Frank H. Easterbrook, Robert B. Nicholson, Rodney O. Thorson, and *Robert J. Wiggers.*

H. Francis DeLone, W. Donald McSweeney, and *Fred H. Bartlit, Jr.,* argued the cause for respondents. With them on the briefs were *Stephen A. Stack, Jr., Mari M. Gursky, William A. Montgomery, Joseph R. Lundy, Thomas A. Gottschalk, Robert C. Keck, James G. Hiering, Cloyd R. Mellott, William B. Mallin, J. Gary Kosinski, D. Richard Funk, Clark M. Clifford, Carson M. Glass,* and *Thomas Richard Spradlin.**

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*A brief of *amici curiae* urging reversal was filed for their respective States by *Evelle J. Younger,* Attorney General of California, *Sanford N. Gruskin,* Chief Assistant Attorney General, *Warren J. Abbott,* Assistant Attorney General, and *Michael I. Spiegel* and *Charles M. Kagay,* Deputy Attorneys General; *William J. Baxley,* Attorney General of Alabama, and *Thomas Troy Zieman, Jr., Jerry L. Weidler,* and *Susan Beth Farmer,* Assistant Attorneys General; *Bruce E. Babbitt,* Attorney General of Arizona, and *Alison B. Swan,* Assistant Attorney General; *J. D. McFarlane,* Attorney General of Colorado, and *Robert F. Hill,* First Assistant Attorney General; *Carl R. Ajello,* Attorney General of Connecticut; *Theodore L. Sendak,* Attorney General of Indiana; *Curt Schneider,* Attorney General of Kansas, and *Thomas W. Regan,* Assistant Attorney General; *William J. Guste, Jr.,* Attorney General of Louisiana; *Francis B. Burch,* Attorney General of Maryland; *John Ashcroft,* Attorney General of Missouri; *William F. Hyland,* Attorney General of New Jersey; *Toney Anaya,* Attorney General of New Mexico; *Louis J. Lefkowitz,* Attorney General of New York, and *John M. Desiderio,* Assistant Attorney General; *Rufus L. Edmisten,* Attorney General of North Carolina, and *David S. Crump,* Special Deputy Attorney General; *James A. Redden,* Attorney General of Oregon, and *Stephen L. Dunne; John L. Hill,* Attorney General of Texas; *Robert B. Hansen,* Attorney General of Utah; *M. Jerome Diamond,* Attorney General of Vermont; *Anthony F. Troy,* Attorney General of Virginia; *Slade Gorton,* Attorney General of Washington, and *Thomas L. Boeder,* Assistant Attorney General; *Bronson C. LaFollette,* Attorney General of Wisconsin, and *Michael L. Zaleski,* Assistant Attorney General.

Stanley T. Kaleczyc, Lawrence B. Kraus, and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the following questions: (a) whether intent is an element of a criminal antitrust offense; (b) whether an exchange of price information for purposes of compliance with the Robinson-Patman Act is exempt from Sherman Act scrutiny; (c) the adequacy of jury instructions on membership in and withdrawal from the alleged conspiracy; and (d) the propriety of an *ex parte* meeting between the trial judge and the foreman of the jury.

I

Gypsum board, a laminated type of wallboard composed of paper, vinyl, or other specially treated coverings over a gypsum core, has in the last 30 years substantially replaced wet plaster as the primary component of interior walls and ceilings in residential and commercial construction. The product is essentially fungible; differences in price, credit terms, and delivery services largely dictate the purchasers' choice between competing suppliers. Overall demand, however, is governed by the level of construction activity and is only marginally affected by price fluctuations.

The gypsum board industry is highly concentrated, with the number of producers ranging from 9 to 15 in the period 1960–1973. The eight largest companies accounted for some 94% of the national sales with the seven "single-plant producers" [1] accounting for the remaining 6%. Most of the major producers and a large number of the single-plant producers are members of the Gypsum Association which since 1930 has served as a trade association of gypsum board manufacturers.

[1] The major producers operate numerous plants to serve a wide range of geographical markets. The single-plant producers are limited in terms of the markets they can serve because of the difficulties and expense involved in long-distance transportation of gypsum board.

A

Beginning in 1966, the Justice Department, as well as the Federal Trade Commission, became involved in investigations into possible antitrust violations in the gypsum board industry. In 1971, a grand jury was empaneled and the investigation continued for an additional 28 months. In late 1973, an indictment was filed in the United States District Court for the Western District of Pennsylvania charging six major manufacturers and various of their corporate officials with violations of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1.[2]

The indictment charged that the defendants had engaged in a combination and conspiracy "[b]eginning sometime prior to 1960 and continuing thereafter at least until sometime in 1973," App. 34, in restraint of interstate trade and commerce in the manufacture and sale of gypsum board. The alleged combination and conspiracy consisted of:

> "[A] continuing agreement understanding and concert of action among the defendants and co-conspirators to (a) raise, fix, maintain and stabilize the prices of gypsum board; (b) fix, maintain and stabilize the terms and conditions of sale thereof; and (c) adopt and maintain uniform methods of packaging and handling such gypsum board." *Ibid.*

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[2] The corporate defendants named in the indictment were: United States Gypsum Co., National Gypsum Co., Georgia Pacific Corp., Kaiser-Gypsum Co., Inc., Celotex Corp., and Flintkote Co. The individual defendants included: the Chairman of the Board and the Executive Vice-President of United States Gypsum, the Chairman of the Board and Vice-President for Sales of National Gypsum, the President of Georgia Pacific, the President and the Vice-President and General Manager of Kaiser-Gypsum, the President of Celotex, and the Chairman of the Board and the President of Flintkote. The Gypsum Association was named as an unindicted co-conspirator as were two other gypsum board producers—Johns-Manville Corp. and Fibreboard Corp.

The indictment proceeded to specify some 13 types of actions taken by conspirators "[i]n formulating and effectuating" the combination and conspiracy, the most relevant of which, for our purposes, is specification (h) which alleged that the conspirators

> "telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom."

The bill of particulars provided additional details about the continuing nature of the alleged exchanges of competitive information and the role played by such exchanges in policing adherence to the various other illegal agreements charged.

B

The first skirmish in the protracted litigation of this case was a motion for dismissal filed by the defendants alleging that their due process rights had been denied because of unreasonable preindictment delay. The District Court, after holding a five-day evidentiary hearing on the motion, concluded that there was "no evidence of unreasonable delay on the part of the Government," 383 F. Supp. 462, 470 (WD Pa. 1974), and that the defendants were not "prejudiced to any extraordinary degree whatsoever by the chain of events leading to this indictment." *Ibid.* The District Court denied a motion to dismiss the indictment. Thereafter nine of the defendants entered pleas of *nolo contendere* and were sentenced.[3] The trial of the remaining seven defendants commenced on March 3, 1975, and lasted some 19 weeks.

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[3] The remaining corporate defendants were United States Gypsum, National Gypsum, Georgia Pacific, and Celotex, and the remaining individual defendants were the Chairman of the Board and the Vice-President of Sales of National Gypsum and the Executive Vice-President of United States Gypsum.

The focus of the Government's price-fixing case at trial was interseller price verification—that is, the practice allegedly followed by the gypsum board manufacturers of telephoning a competing producer to determine the price currently being offered on gypsum board to a specific customer. The Government contended that these price exchanges were part of an agreement among the defendants, had the effect of stabilizing prices and policing agreed-upon price increases, and were undertaken on a frequent basis until sometime in 1973. Defendants disputed both the scope and duration of the verification activities, and further maintained that those exchanges of price information which did occur were for the purposes of complying with the Robinson-Patman Act[4] and preventing customer fraud. These purposes, in defendants' view, brought the disputed communications among competitors within a "controlling circumstance" exception to Sherman Act liability—at the extreme, precluding, as a matter of law, consideration of verification by the jury in determining defendants' guilt on the price-fixing charge, and at the minimum, making the defendants' purposes in engaging in such communications a threshold factual question.

The instructions on the verification issue given by the trial judge provided that if the exchanges of price information were deemed by the jury to have been undertaken "in a good faith effort to comply with the Robinson-Patman Act," verification standing alone would not be sufficient to establish an illegal price-fixing agreement. The paragraphs immediately following, however, provided that the purpose was essentially irrelevant if the jury found that the effect of verification was to raise,

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[4] Defendants contended that the exchange of price information or verification was necessary to enable them to take advantage of the meeting-competition defense contained in § 2 (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (b) (1976 ed.); see Part III, *infra*.

fix, maintain, or stabilize prices. The instructions on verification closed with the observation:

> "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result."

The aspects of the charge dealing with the Government's burden in linking a particular defendant to the conspiracy, and the kinds of evidence the jury could properly consider in determining if one or more of the alleged conspirators had withdrawn from or abandoned the conspiracy were also a subject of some dispute between the judge and defense counsel. On the former, the disagreement was essentially over the proper specificity of the charge. Defendants requested a charge directing the jury to determine "what kind of agreement or understanding, if any, existed as to each defendant" before any could be found to be a member of the conspiracy. The trial judge was unwilling to give this precise instruction and instead emphasized at several points in the charge the jury's obligation to consider the evidence regarding the involvement of each defendant individually, and to find, as a precondition to liability, that each defendant was a knowing participant in the alleged conspiracy.[5]

On the matter of withdrawal from the conspiracy, defendants sought an instruction stating explicitly that evidence of vigorous price competition during the period covered by the indictment could be considered by the jury as indicating abandonment of the charged conspiracy by one or more of the defendants. Substantial evidence on this subject had been

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[5] Relevant portions of the charge dealing with this issue are excerpted in the opinion of the Court of Appeals. 550 F. 2d 115, 127 n. 12 (1977); *id.*, at 137–138 (Weis, J., dissenting).

presented by the defendants in the course of the trial. The judge again was unwilling to accept defendants' construction of the applicable law and substituted an instruction specifying that withdrawal had to be established by either affirmative notice to each other member of the conspiracy or by disclosure of the illegal enterprise to law enforcement officials. The trial judge allowed the defendants to argue their theory of withdrawal to the jury despite his unwillingness to refer to it explicitly in his charge.

C

The jury retired to deliberate early on the evening of Tuesday, July 8, 1975. Supplemental instructions were given in response to questions from the jury on Wednesday and Thursday, and the hours of deliberation were shortened on Friday after the court was informed that some of the jurors were exhausted and not feeling well. On Saturday, after responding to further requests from the jury, the judge, *sua sponte,* in open court, used the supplemental instruction approved by the Court of Appeals[6] to remind the jurors of their obligation to continue the deliberations. Essentially the same instruction was given to the jury again on Sunday, after the judge had received a note detailing the jury's inability to reach a unanimous verdict.

On Monday, the court received yet another note from the jury, this time stating that the foreman wished to "discuss the condition of the Jury" and to seek "further guidance" from the judge. The judge suggested to counsel that he confer privately with the foreman and that a transcript of the meeting be kept but impounded. The judge indicated that if his suggestion was rejected he would simply deny the foreman's request for the meeting. In response to questions from counsel, the judge stated that the purpose of the meeting would be to determine if the jury was in serious physical condition, and

[6] See *United States* v. *Fioravanti,* 412 F. 2d 407 (CA3), cert. denied *sub nom. Panaccione* v. *United States,* 396 U. S. 837 (1969).

he further indicated that no instructions on the law would be given to the foreman without calling in the jury and instructing them in open court with counsel present.[7] After further discussion, all counsel agreed, albeit somewhat reluctantly, to the proposed meeting.

Most of the discussion between the jury foreman and the judge concerned the deteriorating state of health of the jurors after almost five months on the case followed by five days of intensive deliberations and the existence of personality conflicts among the members of the panel. The foreman also stressed at least twice during the conversation with the judge his belief that the jury was unable to reach a verdict and that further discussion would not eliminate the disagreements which existed. The judge indicated that while he would take into consideration what the foreman had said, he wanted the jury to continue its deliberations. Near the close of the meeting, the following colloquy took place:

> "THE COURT. I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say.
>
> "MR. RUSSELL. I appreciate it. It is a situation I don't know how to help you get what you are after.
>
> "THE COURT. Oh, I am not after anything.
>
> "MR. RUSSELL. You are after a verdict one way or the other.
>
> "THE COURT. Which way it goes doesn't make any difference to me." [8]

Shortly thereafter, the foreman returned to the jury room and deliberations continued. The judge then informed counsel, in abbreviated fashion, what had transpired at the meeting with the foreman, and of his direction that the deliberations

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[7] The judge observed that the only instruction he might give the foreman was "to go back and continue his deliberations." App. 1823.

[8] The complete colloquy between the foreman and the judge is reproduced as an appendix to this opinion.

continue.[9] Defense counsel asked to see the transcript of the *in camera* meeting and moved for a mistrial because of the jury's apparent deadlock. These requests were denied,[10] although the judge indicated that if no verdict were rendered by the following Friday, he would then reconsider the mistrial motions. The following morning, the jury returned guilty verdicts against each of the defendants.

D

The Court of Appeals for the Third Circuit reversed the convictions. 550 F. 2d 115 (1977). The panel was unanimous in its rejection of the claim of preindictment delay, but divided over the proper disposition of the remaining issues.

Two judges agreed that the trial judge erred in instructing the jury that an effect on prices resulting from an agreement to exchange price information made out a Sherman Act violation regardless of whether respondents' sole purpose in engaging in such exchanges was to establish a defense to price-discrimination charges. Instead, they regarded such a purpose, if certain conditions were met,[11] as constituting a "con-

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[9] "Significantly, the judge did not tell counsel about the foreman's opinion that the jury was hopelessly deadlocked; did not indicate that the foreman was under the impression that the court wanted a definite verdict either for the prosecution or the defendants; and did not mention the directive to the jury that it should 'see if [it] can come to a verdict.'" 550 F. 2d, at 132 (Adams, J., concurring).

[10] After the conclusion of the trial, the Court of Appeals ordered the transcript of the meeting between the judge and the foreman released to counsel to aid them in preparation of the appeal.

[11] "Therefore, appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue." *Id.*, at 126.

trolling circumstance" which, under *United States* v. *Container Corp.*, 393 U. S. 333 (1969), would excuse what might otherwise constitute an antitrust violation. One judge considered the instructions regarding the purpose and scope of the conspiracy and the kinds of conduct necessary to demonstrate a withdrawal therefrom to be infirm, while another concluded that the convictions should be reversed because the trial judge "improperly induced" the jury into reaching a verdict during the *in camera* conversation with the foreman.

One judge, in dissent, would have sustained the convictions. He regarded the charge on verification to be consistent with *Container Corp.*, and rejected the notion that the Robinson-Patman Act required the exchange of price information even in the limited circumstances identified by the majority. Neither of the alleged infirmities in the general conspiracy instructions, in his view, afforded any basis for reversal, and he disagreed with the characterization of the trial judge's conduct as coercing a verdict.

We granted certiorari, 434 U. S. 815 (1977), and we affirm.

II

We turn first to consider the jury instructions regarding the elements of the price-fixing offense charged in the indictment. Although the trial judge's instructions on the price-fixing issue are not without ambiguity, it seems reasonably clear that he regarded an effect on prices as the crucial element of the charged offense. The jury was instructed that if it found interseller verification had the effect of raising, fixing, maintaining, or stabilizing the price of gypsum board, then such verification could be considered as evidence of an agreement to so affect prices. They were further charged, and it is this point which gives rise to our present concern, that "if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, *as a matter of law,* to have intended that result." App. 1722. (Emphasis added.)

The Government characterizes this charge as entirely consistent with "this Court's long-standing rule that an agreement among sellers to exchange information on current offering prices violates Section 1 of the Sherman Act if it has either the purpose or the effect of stabilizing prices," Reply Brief for United States 1, and relies primarily on our decision in *United States* v. *Container Corp., supra,* a civil case, to support its position. See also *American Column & Lumber Co.* v. *United States,* 257 U. S. 377 (1921); *United States* v. *American Linseed Oil Co.,* 262 U. S. 371 (1923); *Maple Flooring Mfg. Assn.* v. *United States,* 268 U. S. 563 (1925); *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588 (1925). In this view, the trial court's instructions would not be erroneous, even if interpreted, as they were by the Court of Appeals, to *direct* the jury to convict if it found that verification had an effect on prices, regardless of the purpose of the respondents. The Court of Appeals rejected the Government's "effects alone" test, holding instead that in certain limited circumstances, a purpose of complying with the Robinson-Patman Act would constitute a controlling circumstance excusing Sherman Act liability, and hence an instruction allowing the jury to ignore purpose could not be sustained.

We agree with the Court of Appeals that an effect on prices, without more, will not support a criminal conviction under the Sherman Act, but we do not base that conclusion on the existence of any conflict between the requirements of the Robinson-Patman and the Sherman Acts.[12] Rather, we hold that a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. Cf. *Morissette* v. *United States,* 342 U. S. 246, 274–275 (1952). Since the challenged instruction, as we read it, had this pro-

[12] See Part III, *infra.*

hibited effect, it is disapproved. We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses.[13]

A

We start with the familiar proposition that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis* v. *United States*, 341 U. S. 494, 500 (1951). See also *United States* v. *Freed*, 401 U. S. 601, 613 (1971) (BRENNAN, J., concurring in judgment); *United States* v. *Balint*, 258 U. S. 250, 251–253 (1922). In a much-cited passage in *Morissette* v. *United States*, *supra*, at 250–251, Mr. Justice Jackson speaking for the Court observed:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English com-

[13] Our analysis focuses solely on the elements of a criminal offense under the antitrust laws, and leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect. See *United States* v. *Container Corp.*, 393 U. S. 333, 337 (1969); *id.*, at 341 (MARSHALL, J., dissenting). Of course, consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct. See *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918).

> mon law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'" (Footnotes omitted.)

Although Blackstone's requisite "vicious will" has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality, see ALI, Model Penal Code § 2.02 (Prop. Off. Draft 1962), intent generally remains an indispensable element of a criminal offense. This is as true in a sophisticated criminal antitrust case as in one involving any other criminal offense.

This Court, in keeping with the common-law tradition and with the general injunction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide. See, *e. g.*, *Morissette* v. *United States*, *supra*. Cf. *Lambert* v. *California*, 355 U. S. 225 (1957). Indeed, the holding in *Morissette* can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that *mens rea* is required. "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them." 342 U. S., at 263.

While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, see *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57 (1910), the limited circumstances in which Congress has created and this Court has recognized such offenses, see *e. g.*,

United States v. *Balint, supra; United States* v. *Behrman,* 258 U. S. 280 (1922); *United States* v. *Dotterweich,* 320 U. S. 277 (1943); *United States* v. *Freed, supra,* attest to their generally disfavored status. See generally ALI, Model Penal Code, Comment on § 2.05, p. 140 (Tent. Draft No. 4, 1955); W. LaFave & A. Scott, Criminal Law 222–223 (1972). Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement. In the context of the Sherman Act, this generally inhospitable attitude to non-*mens rea* offenses is reinforced by an array of considerations arguing against treating antitrust violations as strict-liability crimes.

B

The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes.[14] Both civil remedies and criminal sanctions are authorized with regard to the same generalized definitions of the conduct proscribed—restraints of trade or commerce and illegal monopolization—without reference to or mention of intent or state of mind. Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits; instead open-ended and fact-specific standards like the "rule of reason" have been applied to broad classes of conduct falling within the purview of the Act's general provisions. See, *e. g., Standard Oil Co.* v. *United States,* 221 U. S. 1, 60 (1911); *United*

[14] Senator Sherman adverted to the open texture of the statutory language in 1890 and accurately forecast its consequence—a central role for the courts in giving shape and content to the Act's proscriptions.

"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . ." 21 Cong. Rec. 2460 (1890).

States v. *Topco Associates,* 405 U. S. 596, 607 (1972); *Continental T. V., Inc.* v. *GTE Sylvania Inc.,* 433 U. S. 36, 49 (1977). Simply put, the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a "generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 359–360 (1933). See generally 2 P. Areeda & D. Turner, Antitrust Law § 310 (1978).

Although in *Nash* v. *United States,* 229 U. S. 373, 376–378 (1913), the Court held that the indeterminacy of the Sherman Act's standards did not constitute a fatal constitutional objection to their criminal enforcement, nevertheless, this factor has been deemed particularly relevant by those charged with enforcing the Act in accommodating its criminal and remedial sanctions. The 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws concluded that the criminal provisions of the Act should be reserved for those circumstances where the law was relatively clear and the conduct egregious:

> "The Sherman Act, inevitably perhaps, is couched in language broad and general. Modern business patterns moreover are so complex that market effects of proposed conduct are only imprecisely predictable. Thus, it may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures. With this hazard in mind, we believe that criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." Report of the Attorney General's National Committee to Study the Antitrust Laws 349 (1955).

The Antitrust Division of the Justice Department took a similar, though slightly more moderate, position in its enforce-

ment guidelines issued contemporaneously with the 1955 Report of the Attorney General's Committee:

> "In general, the following types of offenses are prosecuted criminally: (1) price fixing; (2) other violations of the Sherman Act where there is proof of a specific intent to restrain trade or to monopolize; (3) a less easily defined category of cases which might generally be described as involving proof of use of predatory practices (boycotts for example) to accomplish the objective of the combination or conspiracy; (4) the fact that a defendant has previously been convicted of or adjudged to have been, violating the antitrust laws may warrant indictment for a second offense. . . . The Division feels free to seek an indictment in any case where a prospective defendant has knowledge that practices similar to those in which he is engaging have been held to be in violation of the Sherman Act in a prior civil suit against other persons." [15] *Id.*, at 350.

While not dispositive of the question now before us, the recommendations of the Attorney General's Committee and the guidelines promulgated by the Justice Department highlight the same basic concerns which are manifested in our general requirement of *mens rea* in criminal statutes and suggest that these concerns are at least equally salient in the antitrust context.

Close attention to the type of conduct regulated by the Sherman Act buttresses this conclusion. With certain exceptions for conduct regarded as *per se* illegal because of its unquestionably anticompetitive effects, see, *e. g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), the behavior

[15] In 1967, the Antitrust Division refined its guidelines to emphasize that criminal prosecutions should only be brought against willful violations of the law. See The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact—An Assessment 110 (1967).

proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case—the exchange of price information among competitors—is illustrative in this regard.[16] The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.[17] See 2 P. Areeda & D. Turner, Antitrust Law 29

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[16] The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act. See, *e. g.*, *United States* v. *Citizens & Southern Nat. Bank*, 422 U. S. 86, 113 (1975); *United States* v. *Container Corp.*, 393 U. S., at 338 (Fortas, J., concurring). A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication. See *United States* v. *Container Corp.*, *supra*. See generally L. Sullivan, Law of Antitrust 265–274 (1977). Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not *per se* unlawful have consistently been held to violate the Sherman Act. See *American Column & Lumber Co.* v. *United States*, 257 U. S. 377 (1921); *United States* v. *American Linseed Oil Co.*, 262 U. S. 371 (1923); *United States* v. *Container Corp.*, *supra*.

[17] The possibility that those subjected to strict liability will take extraordinary care in their dealings is frequently regarded as one advantage of a rule of strict liability. See J. Hall, General Principles of Criminal Law

(1978); R. Bork, The Antitrust Paradox 78 (1978); Kadish, Some Observations On the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423, 441–442 (1963). Further, the use of criminal sanctions in such circumstances would be difficult to square with the generally accepted functions of the criminal law. See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 422–425 (1958); ALI, Model Penal Code, Comment on § 2.05, p. 140 (Tent. Draft No. 4, 1955). The criminal sanctions would be used, not to punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken. While in certain cases we have imputed a regulatory purpose to Congress in choosing to employ criminal sanctions, see, *e. g., United States* v. *Balint,* 258 U. S. 250 (1922), the availability of a range of nonpenal alternatives to the criminal sanctions of the Sherman Act negates the imputation of any such purpose to Congress in the instant context.[18] See generally Baker, To Indict or Not To Indict:

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344 (2d ed. 1960); W. LaFave & A. Scott, Criminal Law 222–223 (1972). However, where the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose. See *United States* v. *Park,* 421 U. S. 658, 671–672 (1975).

[18] Congress has recently increased the criminal penalties for violation of the Sherman Act. Individual violations are now treated as felonies punishable by a fine not to exceed $100,000, or by imprisonment for up to three years, or both. Corporate violators are subject to a $1 million fine. 15 U. S. C. § 1 (1976 ed.). The severity of these sanctions provides further support for our conclusion that the Sherman Act should not be construed as creating strict-liability crimes. Cf. *Morissette* v. *United States,* 342 U. S. 246, 256 (1952); Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 72 (1933) (strict liability generally inappropriate when

Prosecutorial Discretion in Sherman Act Enforcement, 63 Cornell L. Rev. 405 (1978).

For these reasons, we conclude that the criminal offenses defined by the Sherman Act should be construed as including intent as an element.[19]

C

Having concluded that intent is a necessary element of a criminal antitrust violation, the task remaining is to treat the practical aspects of this requirement.[20] As we have noted, the language of the Act provides minimal assistance in determining what standard of intent is appropriate, and the sparse legisla-

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offense punishable by imprisonment). Respondents here were not prosecuted under the new penalty provisions since they were indicted prior to the December 21, 1974, effective date for the increased sanctions.

[19] An accommodation of the civil and criminal provisions of the Act similar to that which we approve here was suggested by Senator Sherman in response to Senator George's argument during floor debate that the Act was primarily a penal statute to be construed narrowly in accord with traditional maxims:

"The first section, being a remedial statute, would be construed liberally with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally . . . .

"In providing a remedy the intention of the combination is immaterial. . . .

"The third section is a criminal statute, which would be construed strictly and is difficult to be enforced. In the present state of the law it is impossible to describe, in precise language, the nature and limits of the offense in terms specific enough for an indictment." 21 Cong. Rec. 2456 (1890).

Although the bill being debated by Senators George and Sherman differed in form from the Act as ultimately passed, the colloquy between them indicates that Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and apparently did not intend to do away with them in the Act.

[20] In a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. See W. LaFave & A. Scott, Criminal Law 464–465 (1972). Our discussion here focuses only on the second type of intent.

tive history of the criminal provisions is similarly unhelpful. We must therefore turn to more general sources and traditional understandings of the nature of the element of intent in the criminal law. In so doing, we must try to avoid "the variety, disparity and confusion" of judicial definitions of the "requisite but elusive mental element" of criminal offenses. *Morissette* v. *United States*, 342 U. S., at 252.

The ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of this type. Cf. *Leary* v. *United States*, 395 U. S. 6, 46 n. 93 (1969); *Turner* v. *United States*, 396 U. S. 398, 416 n. 29 (1970). Recognizing that "*mens rea* is not a unitary concept," *United States* v. *Freed*, 401 U. S., at 613 (BRENNAN, J., concurring in judgment), the Code enumerates four possible levels of intent—purpose, knowledge, recklessness, and negligence. In dealing with the kinds of business decisions upon which the antitrust laws focus, the concepts of recklessness and negligence have no place. Our question instead is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the "conscious object" of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow. While the difference between these formulations is a narrow one, see ALI, Model Penal Code, Comment on § 2.02, p. 125 (Tent. Draft No. 4, 1955), we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws.[21]

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[21] In so holding, we do not mean to suggest that conduct undertaken with the purpose of producing anticompetitive effects would not also support criminal liability, even if such effects did not come to pass. Cf. *United States* v. *Griffith*, 334 U. S. 100, 105 (1948). We hold only that this elevated standard of intent need not be established in cases where

Several considerations fortify this conclusion. The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness.

> "[I]t is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result." W. LaFave & A. Scott, Criminal Law 196 (1972).

See also G. Williams, Criminal Law: The General Part §§ 16, 18 (2d ed. 1961); Cook, Act, Intention, and Motive in the Criminal Law, 26 Yale L. J. 645, 653–658 (1917); Perkins, A Rationale of *Mens Rea*, 52 Harv. L. Rev. 905, 910–911 (1939). Generally this limited distinction between knowledge and purpose has not been considered important since "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results." LaFave & Scott, *supra*, at 197. See also ALI, Model Penal Code, Comment on § 2.02, p. 125 (Tent. Draft No. 4, 1955). In either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment. See 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 124 (1970).

Nothing in our analysis of the Sherman Act persuades us that this general understanding of intent should not be applied to criminal antitrust violations such as charged here. The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken

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anticompetitive effects have been demonstrated; instead, proof that the defendant's conduct was undertaken with knowledge of its probable consequences will satisfy the Government's burden.

only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.

D

When viewed in terms of this standard, the jury instructions on the price-fixing charge cannot be sustained. "A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense." *Morissette, supra,* at 275. The challenged jury instruction, as we read it, had precisely this effect; the jury was told that the requisite intent followed, *as a matter of law,* from a finding that the exchange of price information had an impact on prices. Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference. Therefore, although it would be correct to instruct the jury that it may infer intent from an effect on prices, ultimately the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this factfinding function.[22]

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[22] Respondents contend that "prior to the trial of this case, no court had ever held that a mere exchange of information which had a stabilizing effect on prices violated the Sherman Act, regardless of the purpose for the exchange." Joint Brief for Respondents 50. Retroactive application of "this judicially expanded definition of the crime" would, the argument continues, contravene the "principles of fair notice embodied in the Due

III

Our construction of the Sherman Act to require proof of intent as an element of a criminal antitrust violation leaves

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Process Clause." *Ibid.* While we have rejected on other grounds the "effects only" test in the context of criminal proceedings, we do not agree with respondents that the prior case law dealing with the exchange of price information required proof of a purpose to restrain competition in order to make out a Sherman Act violation.

Certainly our decision in *United States* v. *Container Corp.*, 393 U. S. 333 (1969), is fairly read as indicating that proof of an anticompetitive effect is a sufficient predicate for liability. In that case, liability followed from proof that "the exchange of price information has had an anticompetitive effect in the industry," *id.*, at 337, and no suggestion was made that proof of a purpose to restrain trade or competition was also required. Thus, at least in the post-*Container* period, which comprises almost the entire time period at issue here, respondents' claimed lack of notice cannot be credited.

Nor are the prior cases treating exchanges of information among competitors more favorable to respondents' position. See *American Column & Lumber Co.* v. *United States*, 257 U. S., at 400 ("[A]ny concerted action . . . to cause, or which in fact does cause, . . . restraint of competition . . . is unlawful"); *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 389 (1923) ("[A] necessary tendency . . . to suppress competition . . . [is] unlawful"); *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U. S. 563, 585 (1925) (purpose to restrain trade or conduct which "had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices" sufficient for liability). While in *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588 (1925), an exception from Sherman Act liability was recognized for conduct intended to prevent fraud, we do not read that case as repudiating the rule set out in prior cases; instead *Cement* highlighted a narrow limitation on the application of the general rule that either purpose or effect will support liability.

We do not understand respondents to be making the related claim that they relied on the several lower court cases exempting interseller verification for purposes of complying with the Robinson-Patman Act from scrutiny under the Sherman Act, see *infra*, at 452–453, and thus should not be penalized if those decisions turn out to have been incorrect. Whatever the merits of such an argument, respondents would appear unable to invoke it since the initiation of their verification practices antedated those lower court decisions.

unresolved the question upon which the Court of Appeals focused, whether verification of price concessions with competitors for the sole purpose of taking advantage of the § 2 (b) meeting-competition defense should be treated as a "controlling circumstance" precluding liability under § 1 of the Sherman Act. We now turn to that question.[23]

A

In *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588 (1925), the Court held exempt from Sherman Act § 1 liability an exchange of price information among competitors because the exchange of information was necessary to protect the cement manufacturers from fraudulent behavior by contractors.[24] Over 40 years later, in *United States* v. *Container Corp.*, 393 U. S., at 335, Mr. Justice Douglas characterized the *Cement* holding in the following terms:

> "While there was present here, as in *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588, an exchange of prices to specific customers, there was absent the con-

[23] This question was not resolved by the prior discussion because a purpose of complying with the Robinson-Patman Act by exchanging price information is not inconsistent with knowledge that such exchanges of information will have the probable effect of fixing or stabilizing prices. Since we hold knowledge of the probable consequences of conduct to be the requisite mental state in a criminal prosecution like the instant one where an effect on prices is also alleged, a defendant's purpose in engaging in the proscribed conduct will not insulate him from liability unless it is deemed of sufficient merit to justify a general exception to the Sherman Act's proscriptions. Cf. *Cement Mfrs. Protective Assn.* v. *United States*, *supra*.

[24] Respondents maintain that their verification practices not only were for the purpose of complying with the Robinson-Patman Act, but also served to protect them from fraud on the part of their customers, and thus fall squarely within the *Cement* exception. The Court of Appeals rejected this claim, 550 F. 2d, at 123 n. 9, and we find no reason to upset this determination.

> trolling circumstance, *viz.*, that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job."

The use of the phrase "controlling circumstance" in *Container Corp.* implied that the exception from Sherman Act liability recognized in *Cement Mfrs.* was not necessarily limited to the special circumstances of that case, although the exact scope of the exception remained largely undefined.

Since *Container Corp.*, several courts have read the controlling-circumstance exception as encompassing exchanges of price information when undertaken for the purpose of compliance with § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act. See, *e. g.*, *Belliston* v. *Texaco, Inc.*, 455 F. 2d 175, 181–182 (CA10 1972); *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295, 312–315 (ND Cal. 1971).[25] The Court of Appeals in the instant case essentially adopted the same tack—albeit with some additional limitations[26]—finding such a step necessary to eliminate a perceived conflict between the Sherman Act's proscriptions regarding the exchange of price information among competitors and the claimed necessity of such exchanges to perfect the § 2 (b) defense. The Government challenges that resolution on two grounds: first, that there is no general controlling-circumstance exception to the Sherman Act, and second, that, in any event, there is no conflict between the two antitrust statutes which would require the prohibitions of the Sherman Act to

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[25] Although the *Belliston* court did not specifically refer to *Cement's* "controlling circumstance" exception, it adopted the rationale of the *Wall Products* case where that exception was explicitly relied upon to immunize verification from the proscriptions of the Sherman Act.

[26] See n. 11, *supra*.

be tempered even to the degree mandated by the Court of Appeals' carefully circumscribed holding in this case. We agree generally with the Government as to the proper accommodation of the Sherman and Robinson-Patman Acts, and therefore find it unnecessary to address the more general question going to the existence and proper scope of the so-called controlling-circumstance exception.

B

Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (a) (1976 ed.), embodies a general prohibition of price discrimination between buyers when an injury to competition is the consequence. The primary exception to the § 2 (a) bar is the meeting-competition defense which is incorporated as a proviso to the burden-of-proof requirements set out in § 2 (b):

> "*Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The role of the § 2 (b) proviso in tempering the § 2 (a) prohibition of price discrimination was highlighted in *Standard Oil Co.* v. *FTC*, 340 U. S. 231 (1951). There we recognized the potential tension between the rationales underlying the Sherman and Robinson-Patman Acts and sought to effect a partial accommodation by construing § 2 (b) to provide an absolute defense to liability for price discrimination.

> "We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-

> defense against a price raid by a competitor. For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer. . . . There is . . . plain language and established practice which permits a seller, through § 2 (b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." 340 U. S., at 249–250.

In *FTC* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945), the Court provided the first and still the most complete explanation of the kind of showing which a seller must make in order to satisfy the good-faith requirement of the § 2 (b) defense:

> "Section 2 (b) does not require the seller to justify price discriminations by showing that in fact they met a competitor's price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. . . . We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Id.*, at 759–760.

Application of these standards to the facts in *Staley* led to the conclusion that the § 2 (b) defense had not been made out. The record revealed that the lower price had been based simply on reports of salesmen, brokers, or purchasers with no efforts having been made by the seller "to investigate or verify" the reports or the character and reliability of the informants. 324 U. S., at 758. Similarly, in *Corn Products Co.* v. *FTC*, 324 U. S. 726 (1945), decided the same day, the § 2 (b) defense was not allowed because "[t]he only evidence said to

rebut the *prima facie* case . . . of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each witness's assumption or conclusion that the price discriminations were justified by competition." 324 U. S., at 741.

Staley's "investigate or verify" language coupled with *Corn Products*' focus on "personal knowledge of the transactions" have apparently suggested to a number of courts that, at least in certain circumstances, direct verification of discounts between competitors may be necessary to meet the burden-of-proof requirements of the § 2 (b) defense. See *Gray* v. *Shell Oil Co.*, 469 F. 2d 742, 746–747 (CA9 1972); *Belliston* v. *Texaco, Inc.*, 455 F. 2d, at 181–182; *Webster* v. *Sinclair Refining Co.*, 338 F. Supp. 248, 251–252 (SD Ala. 1971); *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp., at 312–315; *Di-Wall, Inc.* v. *Fibreboard Corp.*, 1970 Trade Cases ¶ 73,155 (ND Cal. 1970). In none of these cases were the courts called upon to address directly the question of whether interseller verification was actually *required* to satisfy § 2 (b)'s good-faith standard; instead, the issue was presented only obliquely in the form of a defense to the alleged Sherman Act violation. The *Belliston* and *Webster* cases accepted the defense despite the absence of evidence that alternative means of corroborating the claimed price reduction had been exhausted, while the *Gray* and *Wall Products* courts found the communication between sellers permissible only after other alternatives had been exhausted.[27] The Court of Appeals critically and perceptively analyzed these cases and concluded that only a very narrow exception to Sherman Act liability should be recognized; that exception would cover the relatively few situations where the veracity of the buyer seeking the matching discount was legitimately in doubt, other

[27] The decision in *Di-Wall* is ambiguous on the question of whether alternatives short of verification were exhausted prior to the exchange of price information. 1970 Trade Cases, ¶ 73,155, p. 88,557.

reasonable means of corroboration were unavailable to the seller, and the interseller communication was for the sole purpose of complying with the Robinson-Patman Act. Despite the court's efforts to circumscribe the scope of the exception it was constrained to recognize, we find its analysis unacceptable.

C

A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2 (b) defense. While casual reliance on uncorroborated reports of buyers or sales representatives without further investigation may not, as we noted earlier, be sufficient to make the requisite showing of good faith, nothing in the language of § 2 (b) or the gloss on that language in *Staley* and *Corn Products* indicates that direct discussions of price between competitors are required. Nor has any court, so far as we are aware, ever imposed such a requirement.[28] See Rowe, Pricing and the Robinson-Patman Act, 41 A. B. A. Antitrust L. J. 98, 100–102 (1971); ABA Section of Antitrust Law, Antitrust Law Developments 145 n. 241 (1975). On the contrary, the § 2 (b) defense has been successfully invoked in the absence of interseller verification on numerous occasions, see, *e. g.*, *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F. 2d 714, 725–726 (CA5 1975); *Cadigan* v. *Texaco, Inc.*,

[28] In *Viviano Macaroni Co.* v. *FTC*, 411 F. 2d 255 (CA3 1969), the § 2 (b) defense was not recognized because the seller had relied solely on the report of its customer regarding other competitive offers without undertaking any investigation to corroborate the offer or the reliability of the customer. The Court of Appeals in the instant case read *Viviano* as at least suggesting, if not requiring, interseller verification when the veracity of the buyer was in doubt. As we read that case, however, it simply reaffirms the teaching of *Staley*, and does not compel the further conclusion that only interseller verification will satisfy the good-faith requirement, even in the particular circumstances identified by the Court of Appeals. See 550 F. 2d, at 135 (Weis, J., dissenting).

492 F. 2d 383 (CA9 1974); *Jones* v. *Borden Co.*, 430 F. 2d 568, 572–574 (CA5 1970); *National Dairy Products Corp.* v. *FTC*, 395 F. 2d 517, 523 (CA7 1968). And in *Kroger Co.* v. *FTC*, 438 F. 2d 1372, 1376–1377 (CA6 1971), aff'g *Beatrice Foods Co.*, 76 F. T. C. 719 (1969), the defense was recognized despite the fact that the price concession was ultimately found to have undercut that of the competition and thus technically to have fallen outside the "meet not beat" strictures of the defense. As these cases indicate, and as the Federal Trade Commission observed, it is the concept of good faith which lies at the core of the meeting-competition defense, and good faith

> "is a flexible and pragmatic, not technical or doctrinaire, concept. . . . Rigid rules and inflexible absolutes are especially inappropriate in dealing with the § 2 (b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application." *Continental Baking Co.*, 63 F. T. C. 2071, 2163 (1963).

The so-called problem of the untruthful buyer which concerned the Court of Appeals does not in our view call for a different approach to the § 2 (b) defense. The good-faith standard remains the benchmark against which the seller's conduct is to be evaluated, and we agree with the Government and the FTC that this standard can be satisfied by efforts falling short of interseller verification in most circumstances where the seller has only vague, generalized doubts about the reliability of its commercial adversary—the buyer.[29] Given the

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[29] "Although a seller may take advantage of the meeting competition defense only if it has a commercially reasonable belief that its price concession is necessary to meet an equally low price of a competitor, a seller may acquire this belief, and hence perfect its defense, by doing everything reasonably feasible—short of violating some other statute, such as the Sherman Act—to determine the veracity of a customer's statement that he has been offered a lower price. If, after making reasonable, lawful, inquiries, the seller cannot ascertain that the buyer is lying, the seller is

fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in appraising a seller's good faith in matching a competing offer in these circumstances. Certainly, evidence that a seller had received reports of similar discounts from other customers, cf. *Jones* v. *Borden Co., supra,* at 572–573; or was threatened with a termination of purchases if the discount were not met, cf. *International Air Industries, Inc.* v. *American Excelsior Co., supra,* at 726; *Cadigan* v. *Texaco, Inc., supra,* at 386, would be relevant in this regard. Efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data would also be probative as would the seller's past experience with the particular buyer in question.[30]

There remains the possibility that in a limited number of situations a seller may have substantial reasons to doubt the accuracy of reports of a competing offer and may be unable to corroborate such reports in any of the generally accepted ways. Thus the defense may be rendered unavailable since unan-

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entitled to make the sale. . . . There is no need for a seller to discuss price with his competitors to take advantage of the meeting competition defense." (Citations omitted.) Brief for United States 86–87, and n. 78. See also App. to Pet. for Cert. 97a–99a.

[30] It may also turn out that sustained enforcement of § 2 (f) of the Clayton Act, as amended by the Robinson-Patman Act, which imposes liability on buyers for inducing illegal price discounts, will serve to bolster the credibility of buyers' representations and render reliance thereon by sellers a more reasonable and secure predicate for a finding of good faith under § 2 (b). See generally Note, Meeting Competition Under the Robinson-Patman Act, 90 Harv. L. Rev. 1476, 1495–1496 (1977). In both *Great Atlantic & Pacific Tea Co.* v. *FTC,* 557 F. 2d 971 (CA2 1977), and *Kroger* v. *FTC,* 438 F. 2d 1372 (CA6 1971), buyers have been held liable under § 2 (f) despite the fact that the sellers were either found not to have violated the Robinson-Patman Act (*Kroger*) or were not charged with such a violation (*A&P*). Certiorari has been granted in *Great Atlantic & Pacific Tea Co.* to consider the permissibility of enforcing the Robinson-Patman Act in this manner. 435 U. S. 922 (1978).

swered questions about the reliability of a buyer's representations may well be inconsistent with a good-faith belief that a competing offer had in fact been made.[31] As an abstract proposition, resort to interseller verification as a means of checking the buyer's reliability seems a possible solution to the seller's plight, but careful examination reveals serious problems with the practice.

Both economic theory and common human experience suggest that interseller verification—if undertaken on an isolated and infrequent basis with no provision for reciprocity or cooperation—will not serve its putative function of corroborating the representations of unreliable buyers regarding the existence of competing offers. Price concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concession are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process. See generally F. Scherer, Industrial Market Structure and Economic Performance 208–209, 449 (1970); P. Areeda, Antitrust Analysis 230–231 (2d ed. 1974); Note, Meeting Competition Under the Robinson-Patman Act, 90 Harv. L. Rev. 1476, 1480–1481 (1977). See also *United States* v. *Container Corp.*, 393 U. S., at 337. Thus, if one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused. Instead, such a seller would appear to have at least as great an incentive to misrepresent the existence

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[31] We need not and do not decide that in all such circumstances the defense would be unavailable. The case-by-case interpretation and elaboration of the § 2 (b) defense is properly left to the other federal courts and the FTC in the context of concrete fact situations. We note also that our conclusions regarding the proper interpretation of § 2 (f), see n. 30, *supra*, may well affect subsequent application of the § 2 (b) defense.

or size of the discount as would the buyer who received it. Thus verification, if undertaken on a one-shot basis for the sole purpose of complying with the § 2 (b) defense, does not hold out much promise as a means of shoring up buyers' representations.

The other variety of interseller verification is, like the conduct charged in the instant case, undertaken pursuant to an agreement, either tacit or express, providing for reciprocity among competitors in the exchange of price information. Such an agreement would make little economic sense, in our view, if its sole purpose were to guarantee all participants the opportunity to match the secret price concessions of other participants under § 2 (b). For in such circumstances, each seller would know that his price concession could not be kept from his competitors and no seller participating in the information-exchange arrangement would, therefore, have any incentive for deviating from the prevailing price level in the industry. See *United States* v. *Container Corp., supra,* at 336–337. Regardless of its putative purpose, the most likely consequence of any such agreement to exchange price information would be the stabilization of industry prices. See Scherer, *supra,* at 449; Note, Antitrust Liability for an Exchange of Price Information—What Happened to *Container Corp.*, 63 Va. L. Rev. 639, 666 (1977). Instead of facilitating use of the § 2 (b) defense, such an agreement would have the effect of eliminating the very price concessions which provide the main element of competition in oligopolistic industries and the primary occasion for resort to the meeting-competition defense.

Especially in oligopolistic industries such as the gypsum board industry, the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions. The Department of Justice's 1977 Report on the Robinson-Patman Act focused on the growing use of the Act as a cover for price fixing; former

Antitrust Division Assistant Attorney General Kauper discussed the mechanics of the process:

> "And thus you find in some industries relatively extensive exchanges of price information for the purpose, at least the stated purpose, of complying with the Robinson-Patman Act . . . .
>
> "Now, the mere exchange of price information itself may tend to stabilize prices. But I think it is also relatively common that once that exchange process begins, certain understandings go along with it—that we will exchange prices, but it will be understood, for example, you will not undercut my prices.
>
> "And from there it is a rather easy step into a full-fledged price-fixing agreement. I think we have seen that from time to time, and I suspect we will continue to see it as long as there continues to be a need to justify particular price discriminations in the terms of the Robinson-Patman Act." United States Department of Justice, Report on the Robinson-Patman Act 58–61 (1977).

We are left, therefore, on the one hand, with doubts about both the need for and the efficacy of interseller verification as a means of facilitating compliance with § 2 (b), and, on the other, with recognition of the tendency for price discussions between competitors to contribute to the stability of oligopolistic prices and open the way for the growth of prohibited anticompetitive activity. To recognize even a limited "controlling circumstance" exception for interseller verification in such circumstances would be to remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby. In *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 74 (1953), the Court suggested that as a general rule the Robinson-Patman Act should be construed so as to insure its coherence with "the broader antitrust policies that have been laid down by Congress"; that observation

buttresses our conclusion that exchanges of price information—even when putatively for purposes of Robinson-Patman Act compliance—must remain subject to close scrutiny under the Sherman Act.[32]

IV

One judge of the Court of Appeals was of the view that reversal was required not only because of infirmities in the antitrust instruction, but also because the trial judge had "encroach[ed] on [the] jury['s] authority" and had foreclosed "a possible 'no verdict' outcome." 550 F. 2d, at 134 (Adams, J., concurring). Our own review of the record and the circumstances surrounding the deliberations of the jury, and in particular the *ex parte* communications between the judge and jury foreman, leads us to the same conclusion.

After hearing a mass of testimony for nearly five months, the jurors were sequestered when deliberations commenced. On the second and third days of deliberations, supplemental instructions were given in response to jury questions; on the fourth day, the hours of deliberations were shortened because of reported nervous tension among the jurors; on the fifth day, the judge *sua sponte* delivered what amounted to a modi-

[32] That the § 2 (b) defense may not be available in every situation where a competing offer has in fact been made is not, in our view, a meaningful objection to our holding. The good-faith requirement of the § 2 (b) defense implicitly suggests a somewhat imperfect matching between competing offers actually made and those allowed to be met. Unless this requirement is to be abandoned, it seems clear that inadequate information will, in a limited number of cases, deny the defense to some who, if all the facts had been known, would have been entitled to invoke it. For reasons already discussed, interseller verification does not provide a satisfactory solution to this seemingly inevitable problem of inadequate information. Moreover, § 2 (b) affords only a defense to liability and not an affirmative right under the Act. While sellers are, of course, entitled to take advantage of the defense when they can satisfy its requirements, efforts to increase its availability at the expense of broader, affirmative antitrust policies must be rejected.

fied *Allen* charge [33] in the course of providing further answers to questions from the jury; and on the sixth day, the modified *Allen* charge was repeated, this time in response to a note from the jury that it was unable to reach a verdict. Against this background of internal pressures and apparent disagreements and confusion among the jurors, the jury foreman, on the morning of the seventh day of deliberations, requested a meeting with the judge "to discuss the condition of the Jury and further guidance." The District Judge suggested that he meet alone with the jury foreman and counsel acquiesced. The transcript of the meeting, which was initially impounded but released for purposes of the appeal, contained several references by the foreman to the jury's deadlock, as well as an exchange suggesting the strong likelihood that the foreman carried away from the meeting the impression that the judge wanted a verdict "one way or the other." The judge's report to counsel summarizing the discussion made no reference to either of these matters.[34]

We find this sequence of events disturbing for a number of reasons. Any *ex parte* meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error. This record amply demonstrates that even an experienced trial judge cannot be certain to avoid all the pitfalls inherent in such an enterprise. First, it is difficult to contain, much less to anticipate, the direction the conversation will take at such a meeting. Unexpected questions or comments can generate unintended and misleading impressions of the judge's subjective personal views which have no place in his instruction to the jury—all the more so when counsel are not present to challenge the statements. Second,

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[33] *Allen* v. *United States*, 164 U. S. 492 (1896). An injunction to the jury "to deliberate with a view toward reaching an agreement if you can, without violence, to individual judgment," was also included in the judge's original instruction prior to the commencement of deliberations.

[34] See n. 9, *supra*.

any occasion which leads to communication with the whole jury panel through one juror inevitably risks innocent misstatements of the law and misinterpretations despite the undisputed good faith of the participants. Here, there developed a set of circumstances in which it can fairly be assumed that the foreman undertook to restate to his fellow jurors what he understood the judge to have implied regarding the resolution of the case in a definite verdict "one way or the other." There is, of course, no way to determine precisely what the foreman said when he returned to the jury room.

Finally, the absence of counsel from the meeting and the unavailability of a transcript or full report of the meeting aggravate the problems of having one juror serve as a conduit for communicating instructions to the whole panel. While all counsel acquiesced to the judge's *ex parte* conference with the jury foreman, they did so on the express understanding that the judge merely intended—as no doubt at the time he did—to receive from the foreman a report on the state of affairs in the jury room and the prospects for a verdict. Certainly none of the parties waived the right to a full and accurate report of what transpired at the meeting nor did they agree that the judge was to repeat the instructions as to his understandable reluctance to accept the jury's inability to reach a verdict. Because neither counsel received a full report from the judge, they were not aware of the scope of the conversation between the foreman and the judge, of the judge's statement that the jury should continue to deliberate in order to reach a verdict, or of the real risk that the foreman's impression was that a verdict "one way or the other" was required. Counsel were thus denied any opportunity to clear up the confusion regarding the judge's direction to the foreman, which could readily have been accomplished by requesting that the whole jury be called into the courtroom for a clarifying instruction. See *Rogers* v. *United States*, 422 U. S. 35, 38 (1975); *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S.

76, 81 (1919). Thus, it is not simply the action of the judge in having the private meeting with the jury foreman, standing alone—undesirable as that procedure is—which constitutes the error; rather, it is the fact that the *ex parte* discussion was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict, coupled with the fact that counsel were denied any chance to correct whatever mistaken impression the foreman might have taken from this conversation, that we find most troubling.

While it is, of course, impossible to gauge what part the disputed meeting played in the jury's action of returning a verdict the following morning, this swift resolution of the issues in the face of positive prior indications of hopeless deadlock, at the very least, gives rise to serious questions in this regard. Cf. *Rogers* v. *United States, supra,* at 40–41. In *Jenkins* v. *United States,* 380 U. S. 445 (1965), we held an instruction directing the jury that it *had to* reach a verdict was reversible error; the logic of *Jenkins* cannot be said to be inapposite here, given the peculiar circumstances in which discussions between the judge and the foreman took place.

We are persuaded that the Court of Appeals would have been justified in reversing the convictions solely because of the risk that the foreman believed the court was insisting on a dispositive verdict; a belief which we must assume was promptly conveyed to the jurors. The unintended direction of the colloquy between the judge and the jury foreman illustrates the hazards of *ex parte* communications with a deliberating jury or any of its members.

V

Respondents also challenged in the Court of Appeals the jury instructions regarding participation in the conspiracy and withdrawal therefrom; one judge on the panel concluded that these instructions were infirm. We agree with the Govern-

ment that the charge concerning participation in the conspiracy, while perhaps not as clear as it might have been, was sufficient. The jury was informed repeatedly that only a single conspiracy was alleged and that liability could only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged. As given,[35] the instruction was substantially in accord with those generally given in similar antitrust cases. See ABA Antitrust Section, Jury Instructions in Criminal Antitrust Cases 1964–1976, chs. 10, 28 (1978); 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §§ 55.09, 55.17 (3d ed., 1977). And in any event, the disputed instruction differed in only minor and immaterial respects from the instruction requested by respondents.[36]

We have more difficulty with the instruction on withdrawal from the conspiracy. The jury was charged in the following terms:

> "In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find, from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. To withdraw, a defendant *either must have affirmatively notified each other member of the conspiracy*

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[35] See n. 5, *supra*.

[36] The requested charge was as follows:

"Because the gist of the offense charged is a continuing agreement to raise, fix, maintain and stabilize prices of gypsum products, it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant. Each defendant is chargeable with the acts of his or its fellow defendants and alleged co-conspirators only if the acts are done in furtherance of the joint venture as he or it understood it. No defendant is to be held responsible for what some of the alleged conspirators, unknown to the rest, do beyond the reasonable intendment of the common agreement or understanding, if any, to which you may find him or it a party." 550 F. 2d, at 128–129, n. 13 (emphasis omitted).

he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.

"Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise." (Emphasis added).

Respondents had requested a more expansive instruction which would have specifically allowed the jury to consider a "[r]esumption of competitive behavior, such as intensified price cutting or price wars," as affirmative action showing a withdrawal from the price-fixing enterprise. While the judge allowed this theory to be argued to the jury, he declined to include it in his instructions. The Government now seeks to defend the charge as given on the ground that the first sentence was sufficiently broad to satisfy respondents' concerns, and the third sentence, to which respondents principally object, did not in any meaningful way detract from the generality of the first.

We cannot agree. The charge, fairly read, limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy.[37] Nothing that we have been able to find in the case law suggests, much less commands, that such confining blinders be placed on the jury's freedom to consider evidence regarding the continuing participation of alleged conspirators in the charged conspiracy. Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally

[37] In this case the obligation to notify "each other member" of the charged conspiracy would be a manageable task; in other situations all "other" members might not be readily identifiable.

been regarded as sufficient to establish withdrawal or abandonment. See, *e. g., Hyde* v. *United States,* 225 U. S. 347, 369 (1912); *United States* v. *Borelli,* 336 F. 2d 376, 385 (CA2 1964). See also Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 958 (1959). We conclude that the unnecessarily confining nature of the instruction, standing alone, constituted reversible error.[38] If a new trial takes place, an instruction correcting this error and giving the jury broader compass on the question of withdrawal must be given.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART joins all but Part IV of this opinion.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

[Present: The foreman of the jury and the Court.]

The COURT. What is your problem, sir?

Mr. RUSSELL. I have two problems. And first of all, if I refer to a juror with a sexual gender, I would like it struck, because I would like to say juror.

The COURT. In other words, if he says he or she, make it neutral.

Mr. RUSSELL. The two problems are health and the status of the count.

The COURT. You can't tell me that now.

Mr. RUSSELL. I am not going to tell you what the status is in no way. In fact, I can't tell you, because I can't remember.

[38] The instruction on withdrawal and proper evidence thereof may have been of particular importance here because respondents vigorously argued throughout the trial that competition within the industry resumed before December 27, 1968, the critical date for purposes of the applicable five-year statute of limitations.

The COURT. All right.

Mr. RUSSELL. But first of all, I would like to thank you for that 6:30, because I don't think you would have a jury left. I am not a doctor, but these people are getting very distraught. It is not that they go into a depression and stay there; they go into a depression and they're coming out high. Now I would say at least eight of the jurors are taking some kind of pill. Some of the pills have been even issued by the doctor downstairs. I am not a doctor and I can't judge these things, but I have seen one of [3] these jurors at one time I thought she was going to jump out the window. And I, just for my own sake, without telling you this, I cannot take the responsibility that this could happen. I know this is part of Mr. Keene's job, but like I say, they go high and low, and sometimes by the time I get to Mr. Keene and get him down there, they are perfectly normal again.

In fact, one of the instances was when I saw this one girl—

The COURT. May I ask this: If we discharged—we can excuse one juror for health reasons. Is there any juror we could excuse that would help the situation? If it is more than that, there is no point.

Mr. RUSSELL. I think there is more than that, Judge. I am not a doctor, so I can't say. I'm not even sure these are true sicknesses. They seem—I mean, with the high and low, they seem induced, but when a person thinks they are sick, they're generally sick.

The COURT. It is just as bad, if they think they are.

Mr. RUSSELL. As I say, I am not a doctor. I don't like to be a judge, but I think for my own sake, my feelings, it is my responsibility as foreman to tell you these things. I do not want to be responsible for anybody's health.

The COURT. I don't, either.

[4] You recall, though, that before—when I had two alternate jurors, I asked all the jurors if there was anybody who was not physically able to go ahead and everybody wanted to do it.

Mr. RUSSELL. I realize that. I think every juror out there wants to do their duty.

The COURT. See, we have tried this case now for four months.

Mr. RUSSELL. This is part of it, I will grant you, but it is not the whole part of it. There is some personality conflicts on the jury that have led to certain situations and I think we have overcome those.

The COURT. If we continue to deliberate from 9 to 6:30, with a lunch hour, for a while longer—

Mr. RUSSELL. What I want to tell you next is—and that is, again, my opinion—and you can tell me I am wrong—and I have to look at it in a different way. We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony. It is based on a belief and even if they—even if they would sign a document today, and you would ask me to get up in the jury box and swear I think this is a true and just verdict, I would have to say no, because I believe in the twelve or multiple system of a jury; that if we are to decide beyond a [5] reasonable doubt, when you get twelve, or whatever the number has to be—

The COURT. That is what you have to decide.

Mr. RUSSELL. ———it proves it beyond a shadow of a doubt.

The COURT. Not beyond a shadow of a doubt.

Mr. RUSSELL. I know. Each individual proves it to himself, but for a man to be convicted guilty, or the company, we do it beyond a reasonable doubt, but if you have twelve, you know it is beyond a shadow of a doubt and you cannot have any conscience over it as far as a juror or anything else. That is the way I feel, Judge.

The COURT. What are you suggesting?

Mr. RUSSELL. I am asking you what I should do. I am to the point———

The COURT. I would like this jury to deliberate longer. I

say that because, as I say, we have tried it for a considerable period of time.

Mr. RUSSELL. Everybody realizes that and I do.

The COURT. We have individual people here who are concerned and the jury has now deliberated—they deliberated three full days, Wednesday, Thursday and [6] Friday. They deliberated a half a day on Saturday and a half day on Sunday. They are not deliberating a full day, because jurors usually deliberate until eleven or ten at night.

Mr. RUSSELL. We know that and we want to thank you.

The COURT. You have not deliberated that long yet.

Mr. RUSSELL. I know that is the way you would like it, but what I am trying to tell you is I don't think deliberation is going to change it. It is not a matter of time anymore.

The COURT. Are you telling me this jury is hopelessly deadlocked and will never reach a verdict?

Mr. RUSSELL. In my opinion, it is. I have to rely on that. I have no experience in this kind of thing. I don't know what people go through in a jury. This is the first time I have ever served on one and it is a new experience and I will never forget it. But it is a terrible responsibility and what I said, if it was a matter of finding a document or finding a part of a testimony that would convince somebody, I would say sure, and good.

The COURT. All right.

For the time being continue your deliberations. I will take into consideration what you have told me.

[7] Mr. RUSSELL. As I said, the health problem is something that I think has to be looked at. I don't know how you are going to judge this or whether you call Mr. Keene and ask him or the Marshal's opinion, but I think something ought to be done.

The COURT. All right. I will take it into consideration. I have to talk to counsel.

Mr. RUSSELL. I appreciate that. I didn't expect a decision, but I would like some kind of guidance.

The COURT. I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say.

Mr. RUSSELL. I appreciate it. It is a situation I don't know how to help you get what you are after.

The COURT. Oh, I am not after anything.

Mr. RUSSELL. You are after a verdict one way or the other.

The COURT. Which way it goes doesn't make any difference to me.

Mr. RUSSELL. They keep saying, "If you will tell him what the situation is, he might accept it."

I said, "He doesn't want to know. He told me that he doesn't want to know what the decision is."

[8] The COURT. No, I don't want to know that. It would not be proper for me to know.

Mr. RUSSELL. You may imply something from what I said.

The COURT. I can imply something from just watching, but I don't want you to tell me. That would be a breach of your duty.

Mr. RUSSELL. I have told you as best I can.

The COURT. Thank you. You tell them to keep deliberating and see if they can come to a verdict.

[At 12:04 p. m. the jury foreman returned to the deliberation room.]

Certified true and correct transcript.

/s/ MARION C. WIKE
Marion C. Wike
Official Reporter

[App. 1837–1840.]

MR. JUSTICE POWELL, concurring in part.

I join the judgment and Parts I, II, and V of the Court's opinion.[1] I also join so much of Part III as holds that a

[1] Because the issue discussed in Part IV of the Court's opinion is unlikely to arise at any retrial, I find it unnecessary to express a view as to it.

seller's intention to establish a meeting-competition defense under § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, to a charge of price discrimination under § 2 (a) is not in itself a "controlling circumstance" excusing liability under § 1 of the Sherman Act for otherwise unlawful direct price-verification practices.

I do not join those portions of Part III, however, that might be read as suggesting that there are cases where the § 2 (b) defense is unavailable even though a seller made every reasonable, lawful effort to corroborate his buyer's report that a competitor had offered a lower price before reducing his own price to that buyer. See, *e. g.*, *ante*, at 455–456, 459 n. 32.[2] In my view, a proper accommodation between the policies of the Robinson-Patman Act and the Sherman Act would result in recognition of the § 2 (b) defense in such cases. Otherwise, sellers sometimes would face the unenviable choice of reducing prices to one buyer and risking Robinson-Patman Act liability, refusing to do so and losing the sale, or reducing prices to all buyers.

A prudent businessman faced with this choice often would forgo the price reduction altogether. This reaction would disserve the procompetitive policy of the Sherman Act without advancing materially the antidiscrimination policy of the Robinson-Patman Act. The Court already has made clear that the Robinson-Patman Act "does not require the seller to justify price discriminations by showing that in fact they met a competitive price." *FTC* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 759 (1945). Today the Court confirms that "it is the concept of good faith which lies at the core of the meeting-competition defense, and good faith 'is a flexible and pragmatic, not technical or doctrinaire, concept.'" *Ante*, at 454, quoting *Continental Baking Co.*, 63 F. T. C. 2071, 2163 (1963). A seller who has attempted to verify his buyer's

[2] I do not understand the Court to take a firm position on this issue. See *ante*, at 456 n. 31.

report by every reasonable, lawful means before reducing his price to meet a competitor's price, in my view, has met the test of "good faith." In such a case, if the buyer's report proves to have been untruthful, it is the buyer alone, not the seller, who has acted in bad faith.

MR. JUSTICE REHNQUIST concurring in part and dissenting in part.

I concur in Part I and in the first portion of Part V of the Court's opinion approving the jury instruction on participation in the conspiracy. I dissent from the remaining portions of the opinion and set forth as briefly as possible my reasons for doing so.

Part II of the Court's opinion uses as its point of departure jury instructions on price fixing which the Court correctly characterizes as "not without ambiguity." *Ante,* at 434. However, these jury instructions are but a starting point for the discourse in Part II of the Court's opinion dealing with the element of intent in a criminal case, a discourse which I believe goes beyond any reasoning necessary to dispose of the contentions with respect to that point in this case.

I do not find it necessary to decide the intent which Congress required as a prerequisite for criminal liability under the Sherman Act, because I believe that the instructions given by the District Court, when considered as a whole and in connection with the objections made to them, are sufficiently close to respondents' tendered instructions so as to afford respondents no basis upon which to challenge the verdict. The jury instructions in this case take up some 40 pages of the record and are both detailed and complex. The judge instructed the jury as to both respondents' contention that they exchanged price information solely to comply with the Robinson-Patman Act, and the Government's contention that

> "the Defendants' purpose was not merely to establish their good faith under the Robinson-Patman Act, but that

they exchanged competitive information for the purpose of raising, fixing, maintaining, and stabilizing prices.

"It will be up to you, members of the jury, to resolve these issues.

"First, you must determine whether there was an agreement, either implied or express, to engage in the practice of price checking or verification. . . .

. . . . .

"Secondly, you must determine *whether the purpose* for the exchange of competitive information between the Defendants and their alleged co-conspirators was to insure a good faith meeting of competition, as a defense to the Robinson-Patman Act.

"If you decide that, if you decide that this was *merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged.*

"However, if you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these changes [*sic*] as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain, and stabilize list prices." App. 1720–1721 (emphasis added).

Read in conjunction with the above, the portions of the instructions quoted by the Court, *ante*, at 430, are not reversible error. The jury was instructed that it must find a purpose "to raise, fix, maintain, and stabilize list prices" and that this purpose could be presumed from the effect of respondents' agreement. Respondents' proposed instruction* does not

*"There has been evidence in this case of a defendant's contacting a competitor to verify the existence or nonexistence of a reported lower price or other competitive condition in the market place. This practice has been referred to as 'verification.' There is evidence that verification was engaged in by defendants for the purpose of compliance with the

significantly differ from that given by the District Court. I might add that in my view it would take plainly erroneous instructions, the error of which was both quite precisely and reasonably pointed out to the District Court, to warrant reversal of a judgment entered upon a jury's verdict following five months of trial.

The portions of Part II which I find most troubling are not those which expressly address the congressionally prescribed requirement of intent for criminal liability under the Sherman Act, but those which discourse at length upon the role of intent in the imposition of criminal liability in general, particularly those which might be taken to import any special constitutional difficulty if criminal liability is imposed without fault. While the Court emphasizes that its result is not constitutionally required, *ante*, at 437, the Court's broad policy statements may be misread by the lower courts. I also feel bound to say that while I am willing to respectfully defer to the views of the distinguished authors of the American Law Institute's Model Penal Code, and to the authors of law review articles and treatises such as those sprinkled throughout the text of Part II of the Court's opinion, I have serious reservations about the undiscriminating emphasis and weight which the Court appears to give them in this case.

For similar reasons, I do not believe that it is necessary in this case to address the interrelationship of the Robinson-Patman Act's meeting-competition defense and the Sherman Act, and I cheerfully refrain from that task. The jury was clearly instructed that if price information was exchanged "in a good faith effort to comply with the Robinson-Patman Act,"

Robinson-Patman Act, one of the federal antitrust laws. I charge you as a matter of law that no finding of guilt may be made in this case based on verification engaged in for the purpose of compliance with the Robinson-Patman Act. Further, to consider verification as any evidence whatsoever of an alleged price-fixing conspiracy you must first determine beyond a reasonable doubt that the purpose of verification was *not* compliance with the Robinson-Patman Act." App. 1857.

this exchange by itself would not make out a violation of the Sherman Act. I believe that the communications between the judge and the jury foreman described in Part IV of the Court's opinion, having been consented to by all parties to the case, would not justify a reversal of the verdict of the jury. I agree with that portion of Part V of the Court's opinion which approves the charge given the jury concerning participation in the conspiracy, but disagree with that portion of Part V which seems to approve a more expansive instruction with respect to withdrawal from the conspiracy. In my opinion, neither of these instructions of the District Court was sufficient, either separately or together, to warrant reversal of the jury's verdict of guilty.

I therefore conclude that the judgment of the Court of Appeals should be reversed, and the judgment of the District Court based upon the jury's verdict should be reinstated.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

There are three reasons why I am unable to subscribe to the bifurcated construction of § 1 of the Sherman Act which the Court adopts in Part II of its opinion.

In 1955 I subscribed to the view that criminal enforcement of the Sherman Act is inappropriate unless the defendants have deliberately violated the law.[1] I adhere to that view today. But since 1890 when the Sherman Act was enacted, the statute has had the same substantive reach in criminal and civil cases. No matter how wise the new rule that the Court adopts today may be, I believe it is an amendment only Congress may enact.

If I were fashioning a new test of criminal liability, I would require proof of a specific purpose to violate the law rather than mere knowledge that the defendants' agreement has had

[1] Report of the Attorney General's National Committee to Study the Antitrust Laws 349–351 (1955).

an adverse effect on the market.[2] Under the lesser standard adopted by the Court, I believe MR. JUSTICE REHNQUIST is quite right in viewing the error in the trial judge's instructions as harmless. *Ante,* at 471–473. There is, of course, a theoretical possibility that defendants could engage in a practice of exchanging current price information that was sufficiently prevalent to have had a marketwide impact that they did not know about, but as a practical matter that possibility is surely remote.

Finally, I am afraid that the new civil-criminal dichotomy may work mischief in the civil enforcement of the prohibition against tampering with prices in a free market. Conclusive presumptions play a central role in the enforcement, both civil and criminal, of the Sherman Act. Thus, an agreement to charge the same price,[3] or to adopt a common purchasing policy that determines the market price,[4] is unreasonable, and therefore unlawful, without any proof of the purpose or the actual effect of the agreement. The law presumes that those who entered the price-fixing agreement knew that forbidden effects would follow, and it also presumes, conclusively, that those effects will follow. In a criminal prosecution for price fixing in violation of the Sherman Act it is, therefore, irrelevant whether the prices fixed were reasonable or whether the defendant's intentions were good.[5] See *United States* v.

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[2] The distinction between the two standards is explained *ante,* at 444–445. The Report of the Attorney General's Committee recommended that "criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." Report, *supra* n. 1, at 349.

[3] *United States* v. *Trenton Potteries Co.,* 273 U. S. 392.

[4] *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150.

[5] In fact, early in the development of criminal enforcement of the Sherman Act, this Court stated:

"[T]he conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily

Trenton Potteries Co., 273 U. S. 392. As Mr. Justice Stone explained for the Court in that case, "the Sherman law is not only a prohibition against the infliction of a particular type of public injury. It 'is a limitation of rights, . . . which may be pushed to evil consequences and therefore restrained.'" *Id.*, at 398 (citation omitted).

To be sure, cases such as *Trenton Potteries* involved conduct that was determined to be illegal on its face, while in this case the trial court appraised respondents' agreement under "rule of reason" analysis.[6] But properly understood, rule-of-reason analysis is not distinct from *"per se"* analysis. On the contrary, agreements that are illegal *per se* are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to establish their illegality, but they nonetheless violate the basic rule of reason.[7]

As applied to an agreement among major producers to exchange current price information, the rule of reason requires an element in addition to proof of the agreement itself—either an actual market effect or an express purpose to affect market price—but once that element is shown, any additional showing of intent is unnecessary. See *United States* v. *Container Corp.*, 393 U. S. 333. The rule is premised on the assumption that if the practice of exchanging current price information is sufficiently prevalent to affect the market price, then there is

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and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result." *United States* v. *Patten*, 226 U. S. 525, 543.

[6] An argument can be made that an agreement among the major producers in the market to exchange current price information should be considered illegal on its face. As the Court points out, "[e]xchanges of current price information . . . have the greatest potential for generating anticompetitive effects and . . . have consistently been held to violate the Sherman Act." *Ante*, at 441 n. 16.

[7] Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. L. Rev. 137, 139 (1962).

an extremely high probability that the sales representatives of these companies had actual knowledge of that fact. Given the language of § 1, that premise is as valid in the context of a criminal prosecution as it is in the context of a treble-damages civil action.

Accordingly, although I agree with much of the abstract discussion in Part II of the Court's opinion, I concur only in Parts I, III, IV, and V, and in the judgment.

BUTZ ET AL. *v.* ECONOMOU ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 76-709. Argued November 7, 1977—Decided June 29, 1978

After an unsuccessful Department of Agriculture proceeding to revoke or suspend the registration of respondent's commodity futures commission company, respondent filed an action for damages in District Court against petitioner officials (including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, the Chief Hearing Examiner who had recommended sustaining the administrative complaint, and the Department attorney who had prosecuted the enforcement proceeding), alleging, *inter alia*, that by instituting unauthorized proceedings against him they had violated various of his constitutional rights. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. *Held:*

1. Neither *Barr* v. *Matteo*, 360 U. S. 564, nor *Spalding* v. *Vilas*, 161 U. S. 483, supports petitioners' contention that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Nor did either of those cases purport to abolish the liability of federal officers for actions manifestly beyond their line of duty; if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability. Pp. 485–496.

2. Without congressional directions to the contrary, it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under 42 U. S. C. § 1983, *Scheuer* v. *Rhodes*, 416 U. S. 232, and suits brought directly under the Constitution against federal officials, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388. *Federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers. Pp. 496–504.

3. In a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer* v. *Rhodes, supra,* subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. While federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law, there is no substantial basis for holding that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the Constitution or in a manner that they should know transgresses a clearly established constitutional rule. Pp. 504–508.

4. Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, there are some officials whose special functions require a full exemption from liability. Pp. 508–517.

(a) In light of the safeguards provided in agency adjudication to assure that the hearing examiner or administrative law judge exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency, the risk of an unconstitutional act by one presiding at the agency hearing is clearly outweighed by the importance of preserving such independent judgment. Therefore, persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Pp. 508–514.

(b) Agency officials who perform functions analogous to those of a prosecutor must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision. Pp. 515–516.

(c) There is no substantial difference between the function of an agency attorney in presenting evidence in an agency hearing and the function of the prosecutor who brings evidence before a court, and since administrative agencies can act in the public interest only if they can adjudicate on the basis of a complete record, an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence. Pp. 516–517.

5. The case is remanded for application of the foregoing principles

to the claims against the particular petitioner-defendants involved. P. 517.

535 F. 2d 688, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed an opinion, concurring in part and dissenting in part, in which BURGER, C. J., and STEWART and STEVENS, JJ., joined, *post*, p. 517.

Deputy Solicitor General Friedman argued the cause for petitioners. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock, Robert E. Kopp,* and *Barbara L. Herwig.*

David C. Buxbaum argued the cause and filed a brief for respondents.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violations of citizens' constitutional rights. Respondent[1] filed suit against a number of officials in the Department of Agriculture claiming that they had instituted an investigation and an administrative proceeding against him in retaliation for his criticism of that agency. The District Court dismissed the action on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court of Appeals reversed, holding that the defendants were entitled only to the qualified immunity available to their counterparts in state government. *Economou* v. *U. S. Department of Agriculture,* 535 F. 2d 688 (1976). Because of

[1] The individual Arthur N. Economou, his corporation Arthur N. Economou and Co., and another corporation which he heads, the American Board of Trade, Inc., were all plaintiffs in this action and are all respondents in this Court. For convenience, however, we refer to Arthur N. Economou and his interests in the singular, as "respondent."

the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari. 429 U. S. 1089.

I

Respondent controls Arthur N. Economou and Co., Inc., which was at one time registered with the Department of Agriculture as a commodity futures commission merchant. Most of respondent's factual allegations in this lawsuit focus on an earlier administrative proceeding in which the Department of Agriculture sought to revoke or suspend the company's registration. On February 19, 1970, following an audit, the Department of Agriculture issued an administrative complaint alleging that respondent, while a registered merchant, had willfully failed to maintain the minimum financial requirements prescribed by the Department. After another audit, an amended complaint was issued on June 22, 1970. A hearing was held before the Chief Hearing Examiner of the Department, who filed a recommendation sustaining the administrative complaint. The Judicial Officer of the Department, to whom the Secretary had delegated his decisional authority in enforcement proceedings, affirmed the Chief Hearing Examiner's decision. On respondent's petition for review, the Court of Appeals for the Second Circuit vacated the order of the Judicial Officer. It reasoned that "the essential finding of willfulness . . . was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies." *Economou* v. *U. S. Department of Agriculture*, 494 F. 2d 519 (1974).

While the administrative complaint was pending before the Judicial Officer, respondent filed this lawsuit in Federal District Court. Respondent sought initially to enjoin the progress of the administrative proceeding, but he was unsuccessful in that regard. On March 31, 1975, respondent filed a second

amended complaint seeking damages. Named as defendants were the individuals who had served as Secretary and Assistant Secretary of Agriculture during the relevant events; the Judicial Officer and Chief Hearing Examiner; several officials in the Commodity Exchange Authority; [2] the Agriculture Department attorney who had prosecuted the enforcement proceeding; and several of the auditors who had investigated respondent or were witnesses against respondent.[3]

The complaint stated that prior to the issuance of the administrative complaints respondent had been "sharply critical of the staff and operations of Defendants and carried on a vociferous campaign for the reform of Defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading." App. 157–158. The complaint also stated that, some time prior to the issuance of the February 19 complaint, respondent and his company had ceased to engage in activities regulated by the defendants. The complaint charged that each of the administrative complaints had been issued without the notice or warning required by law; that the defendants had furnished the complaints "to interested persons and others without furnishing respondent's answers as well"; and that following the issuance of the amended complaint, the defendants had issued a "deceptive" press release that "falsely indicated to the public that [respondent's] financial resources had deteriorated, when Defendants knew that their statement was untrue and so acknowledge[d] previously that said assertion was untrue." *Ibid.*[4]

The complaint then presented 10 "causes of action," some

[2] These individuals included the Administrator of the Commodity Exchange Authority, the Director of its Compliance Division, the Deputy Director of its Registration and Audit Division, and the Regional Administrator for the New York Region.

[3] Also named as defendants were the United States, the Department of Agriculture and the Commodity Exchange Authority.

[4] More detailed allegations concerning many of the incidents charged in the complaint were contained in an affidavit filed by respondent in connection with his earlier efforts to obtain injunctive relief.

of which purported to state claims for damages under the United States Constitution. For example, the first "cause of action" alleged that respondent had been denied due process of law because the defendants had instituted unauthorized proceedings against him without proper notice and with the knowledge that respondent was no longer subject to their regulatory jurisdiction. The third "cause of action" stated that by means of such actions "the Defendants discouraged and chilled the campaign of criticism [plaintiff] directed against them, and thereby deprived the [plaintiff] of [his] rights to free expression guaranteed by the First Amendment of the United States Constitution." [5]

The defendants moved to dismiss the complaint on the ground that "as to the individual defendants it is barred by the doctrine of official immunity . . . ." *Id.*, at 163. The defendants relied on an affidavit submitted earlier in the litigation by the attorney who had prosecuted the original administrative complaint against respondent. He stated that the Secretary of Agriculture had had no involvement with the case and that each of the other named defendants had acted "within the course of his official duties." *Id.*, at 142–149.

The District Court, apparently relying on the plurality opinion in *Barr* v. *Matteo*, 360 U. S. 564 (1959), held that the individual defendants would be entitled to immunity if they could show that "their alleged unconstitutional acts were

[5] In the second "cause of action," respondent stated that the defendants had issued administrative orders "illegal and punitive in nature" against him when he was no longer subject to their authority. The fourth "cause of action" alleged, *inter alia*, that respondent's rights to due process of law and to privacy as guaranteed by the Federal Constitution had been infringed by the furnishing of the administrative complaints to interested persons without respondent's answers. The fifth "cause of action" similarly alleged as a violation of due process that defendants had issued a press release containing facts the defendants knew or should have known were false. Respondent's remaining "causes of action" allege common-law torts: abuse of legal process, malicious prosecution, invasion of privacy, negligence, and trespass.

within the outer perimeter of their authority and discretionary." App. to Pet. for Cert. 25a. After examining the nature of the acts alleged in the complaint, the District Court concluded: "Since the individual defendants have shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary, we dismiss the second amended complaint as to them." [6] *Id.*, at 28a.

The Court of Appeals for the Second Circuit reversed the District Court's judgment of dismissal with respect to the individual defendants. *Economou* v. *U. S. Department of Agriculture*, 535 F. 2d 688 (1976). The Court of Appeals reasoned that *Barr* v. *Matteo*, *supra*, did not "represen[t] the last word in this evolving area," 535 F. 2d, at 691, because principles governing the immunity of officials of the Executive Branch had been elucidated in later decisions dealing with constitutional claims against state officials. *E. g.*, *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Wood* v. *Strickland*, 420 U. S. 308 (1975). These opinions were understood to establish that officials of the Executive Branch exercising discretionary functions did not need the protection of an absolute immunity from suit, but only a qualified immunity based on good faith and reasonable grounds. The Court of Appeals rejected a proposed distinction between suits against state officials sued pursuant to 42 U. S. C. § 1983 and suits against federal officials under the Constitution, noting that "[o]ther circuits have also concluded that the Supreme Court's development of official immunity doctrine in § 1983 suits against state officials applies with equal force to federal officers sued on a cause of action derived directly from the Constitution, since both types of suits serve the same function of protecting citizens against violations of their constitutional rights by government officials." 535 F. 2d, at 695 n. 7. The Court of Appeals recog-

[6] The District Court held that the complaint was barred as to the Government agency defendants by the doctrine of sovereign immunity.

nized that under *Imbler* v. *Pachtman,* 424 U. S. 409 (1976), state prosecutors were entitled to absolute immunity from § 1983 damages liability but reasoned that Agriculture Department officials performing analogous functions did not require such an immunity because their cases turned more on documentary proof than on the veracity of witnesses and because their work did not generally involve the same constraints of time and information present in criminal cases. 535 F. 2d, at 696 n. 8. The court concluded that all of the defendants were "adequately protected by permitting them to avail themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in *Scheuer* and *Wood.*" *Id.,* at 696. After noting that summary judgment would be available to the defendants if there were no genuine factual issues for trial, the Court of Appeals remanded the case for further proceedings.

II

The single submission by the United States on behalf of petitioners is that all of the federal officials sued in this case are absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes they infringed respondent's constitutional rights and even if the violation was knowing and deliberate. Although the position is earnestly and ably presented by the United States, we are quite sure that it is unsound and consequently reject it.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), the victim of an arrest and search claimed to be violative of the Fourth Amendment brought suit for damages against the responsible federal agents. Repeating the declaration in *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803), that "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,'" 403 U. S., at 397, and stating that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *id.,* at 395, we rejected the claim

that the plaintiff's remedy lay only in the state court under state law, with the Fourth Amendment operating merely to nullify a defense of federal authorization. We held that a violation of the Fourth Amendment by federal agents gives rise to a cause of action for damages consequent upon the unconstitutional conduct. *Ibid.*[7]

Bivens established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts,[8] but we reserved the question whether the agents involved were "immune from liability by virtue of their official position," and remanded the case for that determination. On remand, the Court of Appeals for the Second Circuit, as has every other Court of Appeals that has faced the question,[9] held that the agents were not absolutely immune and that the public interest would be sufficiently protected by according the agents and their superiors a qualified immunity.

In our view, the Courts of Appeals have reached sound results. We cannot agree with the United States that our prior cases are to the contrary and support the rule it now urges us to embrace. Indeed, as we see it, the Government's

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[7] Although we had noted in *Bell* v. *Hood*, 327 U. S. 678 (1946), that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief," *id.*, at 684, the specific question faced in *Bivens* had been reserved.

[8] The Court's opinion in *Bivens* concerned only a Fourth Amendment claim and therefore did not discuss what other personal interests were similarly protected by provisions of the Constitution. We do not consider that issue here. Cf. *Doe* v. *McMillan*, 412 U. S. 306, 325 (1973).

[9] *Black* v. *United States*, 534 F. 2d 524 (CA2 1976); *States Marine Lines* v. *Shultz*, 498 F. 2d 1146 (CA4 1974); *Mark* v. *Groff*, 521 F. 2d 1376 (CA9 1975); *G. M. Leasing Corp.* v. *United States*, 560 F. 2d 1011 (CA10 1977); *Apton* v. *Wilson*, 165 U. S. App. D. C. 22, 506 F. 2d 83 (1974); see *Paton* v. *La Prade*, 524 F. 2d 862 (CA3 1975); *Weir* v. *Muller*, 527 F. 2d 872 (CA5 1976); *Brubaker* v. *King*, 505 F. 2d 534 (CA7 1974); *Jones* v. *United States*, 536 F. 2d 269 (CA8 1976).

submission is contrary to the course of decision in this Court from the very early days of the Republic.

The Government places principal reliance on *Barr* v. *Matteo*, 360 U. S. 564 (1959). In that case, the acting director of an agency had been sued for malicious defamation by two employees whose suspension for misconduct he had announced in a press release. The defendant claimed an absolute or qualified privilege, but the trial court rejected both and the jury returned a verdict for plaintiff.

In the 1958 Term,[10] the Court granted certiorari in *Barr* "to determine whether in the circumstances of this case petitioner's claim of absolute privilege should have stood as a bar to maintenance of the suit despite the allegations of malice made in the complaint." *Id.*, at 569. The Court was divided in reversing the judgment of the Court of Appeals, and there was no opinion for the Court.[11] The plurality opinion inquired whether the conduct complained of was among those

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[10] The case had been before the Court once before, during the 1957 Term. After the trial, the defendant had appealed only the denial of an absolute privilege. The Court of Appeals affirmed the judgment against him on the ground that the press release exceeded his authority. *Barr* v. *Matteo*, 100 U. S. App. D. C. 319, 244 F. 2d 767 (1957). This Court vacated that judgment, 355 U. S. 171 (1957), directing the Court of Appeals to consider the qualified-privilege question. This the Court of Appeals did, 103 U. S. App. D. C. 176, 256 F. 2d 890 (1958), holding as this Court described it, that "the press release was protected by a qualified privilege, but that there was evidence from which a jury could reasonably conclude that petitioner had acted maliciously, or had spoken with lack of reasonable grounds for believing that his statement was true, and that either conclusion would defeat the qualified privilege." 360 U. S., at 569. Because the case was remanded for a new trial, the defendant sought certiorari a second time.

[11] Mr. Justice Harlan's opinion in *Barr* was joined by three other Justices. The majority was formed through the concurrence in the judgment of Mr. Justice Black, who emphasized in a separate opinion the strong public interest in encouraging federal employees to ventilate their ideas about how the Government should be run. *Id.*, at 576.

"matters committed by law to [the official's] control" and concluded, after an analysis of the specific circumstances, that the press release was within the "outer perimeter of [his] line of duty" and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." *Id.*, at 575. The plurality then held that under *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the act was privileged and that the officer could not be held liable for the tort of defamation despite the allegations of malice.[12] *Barr* clearly held that a false and damaging publication, the issuance of which was otherwise within the official's authority, was not itself actionable and would not become so by being issued maliciously. The Court did not choose to discuss whether the director's privilege would be defeated by showing that he was without reasonable grounds for believing his release was true or that he knew that it was false, although the issue was in the case as it came from the Court of Appeals.[13]

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[12] The Court wrote a similar opinion and entered a similar judgment in a companion case, *Howard* v. *Lyons*, 360 U. S. 593 (1959). There a complaint for defamation under state law alleged the publication of a deliberate and knowing falsehood by a federal officer. Judgment was entered for the officer before trial on the ground that the release was within the limits of his authority. The judgment was reversed in part by the Court of Appeals on the ground that in some respects the defendant was entitled to only a qualified privilege. This Court reversed, ruling that *Barr* controlled.

[13] See n. 10, *supra*. The question presented in the Government's petition for certiorari was broadly framed:

"Whether the absolute immunity from defamation suits, accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision." Pet. for Cert. in *Barr* v. *Matteo*, O. T. 1958, No. 350, p. 2.

This question might be viewed as subsuming the question whether the official's immunity extended to situations in which the official had no reasonable grounds for believing that a statement was true.

Barr does not control this case. It did not address the liability of the acting director had his conduct not been within the outer limits of his duties, but from the care with which the Court inquired into the scope of his authority, it may be inferred that had the release been unauthorized, and surely if the issuance of press releases had been expressly forbidden by statute, the claim of absolute immunity would not have been upheld. The inference is supported by the fact that MR. JUSTICE STEWART, although agreeing with the principles announced by Mr. Justice Harlan, dissented and would have rejected the immunity claim because the press release, in his view, was not action in the line of duty. 360 U. S., at 592. It is apparent also that a quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority.

Barr did not, therefore, purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers. The immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law. See *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 865–866 (1824).[14] A federal

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[14] Mr. Chief Justice Marshall explained:

"An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of congress to imply, without expressing, this very exemption from State control . . . . The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of duty; and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone . . . ."

official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts. For example, *Little* v. *Barreme,* 2 Cranch 170 (1804), held the commander of an American warship liable in damages for the seizure of a Danish cargo ship on the high seas. Congress had directed the President to intercept any vessels reasonably suspected of being en route *to* a French port, but the President had authorized the seizure of suspected vessels whether going *to* or *from* French ports, and the Danish vessel seized was en route *from* a forbidden destination. The Court, speaking through Mr. Chief Justice Marshall, held that the President's instructions could not "change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass." *Id.,* at 179. Although there was probable cause to believe that the ship was engaged in traffic with the French, the seizure at issue was not among that class of seizures that the Executive had been authorized by statute to effect. See also *Wise* v. *Withers,* 3 Cranch 331 (1806).

Bates v. *Clark,* 95 U. S. 204 (1877), was a similar case. The relevant statute directed seizures of alcoholic beverages in Indian country, but the seizure at issue, which was made upon the orders of a superior, was not made in Indian country. The "objection fatal to all this class of defenses is that in that locality [the seizing officers] were utterly without any authority in the premises" and hence were answerable in damages. *Id.,* at 209.

As these cases demonstrate, a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law. "To make out his defence he must show that his authority was sufficient in law to protect him." *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U. S. 446, 452 (1883); *Belknap* v. *Schild,* 161 U. S. 10, 19 (1896). Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of

law, there could be no immunity defense.[15] See *United States* v. *Lee*, 106 U. S. 196, 218–223 (1882); *Virginia Coupon Cases*, 114 U. S. 269, 285–292 (1885).[16]

In both *Barreme* and *Bates*, the officers did not merely mistakenly conclude that the circumstances warranted a particular seizure, but failed to observe the limitations on their authority by making seizures not within the category or type of seizures they were authorized to make. *Kendall* v. *Stokes*, 3 How. 87 (1845), addressed a different situation. The case involved a suit against the Postmaster General for erroneously suspending payments to a creditor of the Post Office. Examining and, if necessary, suspending payments to creditors were among the Postmaster's normal duties, and it appeared that he had simply made a mistake in the exercise of the discretion conferred upon him. He was held not liable in damages since "a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual [is not] liable in an action for an error of judgment." *Id.*, at 97–98. Having "the right to examine into this account" and the right to suspend it in the proper circumstances, *id.*, at 98, the officer was not liable in damages if he fell into error, provided, however, that he acted "from a sense of public duty and without malice." *Id.*, at 99.

Four years later, in a case involving military discipline, the Court issued a similar ruling, exculpating the defendant

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[15] Indeed, there appears to have been some doubt as to whether even an Act of Congress would immunize federal officials from suits seeking damages for constitutional violations. See *Milligan* v. *Hovey*, 17 F. Cas. 380 (No. 9,605) (CC Ind. 1871); *Griffin* v. *Wilcox*, 21 Ind. 370, 372–373 (1863). See generally Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 50–51 (1972).

[16] While the *Virginia Coupon Cases*, like *United States* v. *Lee*, involved a suit for the return of specific property, the principles espoused therein are equally applicable to a suit for damages and were later so applied. *Atchison, Topeka & Santa Fe R. Co.* v. *O'Connor*, 223 U. S. 280, 287 (1912).

officer because of the failure to prove that he had exceeded his jurisdiction or had exercised it in a malicious or willfully erroneous manner: "[I]t is not enough to show he committed an error of judgment, but it must have been a malicious and wilful error." *Wilkes* v. *Dinsman*, 7 How. 89, 131 (1849).

In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), on which the Government relies, the principal issue was whether the malicious motive of an officer would render him liable in damages for injury inflicted by his official act that otherwise was within the scope of his authority. The Postmaster General was sued for circulating among the postmasters a notice that assertedly injured the reputation of the plaintiff and interfered with his contractual relationships. The Court first inquired as to the Postmaster General's authority to issue the notice. In doing so, it "recognize[d] a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision." *Id.*, at 498. Concluding that the circular issued by the Postmaster General "was not unauthorized by law, nor beyond the scope of his official duties," the Court then addressed the major question in the case—whether the action could be "maintained because of the allegation that what the officer did was done maliciously?" *Id.*, at 493. Its holding was that the head of a department could not be "held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority," however improper his motives might have been. *Id.*, at 498. Because the Postmaster General in issuing the circular in question "did not exceed his authority, nor pass the line of his duty," *id.*, at 499, it was irrelevant that he might have acted maliciously.[17]

[17] An individual might be viewed as acting maliciously where "the circumstances show that he is not disagreeably impressed by the fact that

Spalding made clear that a malicious intent will not subject a public officer to liability for performing his authorized duties as to which he would otherwise not be subject to damages liability.[18] But *Spalding* did not involve conduct manifestly or otherwise beyond the authority of the official, nor did it involve a mistake of either law or fact in construing or applying the statute.[19] It did not purport to immunize officials

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his action injuriously affects the claims of particular individuals." 161 U. S., at 499.

[18] In addressing the liability of the Postmaster General, the Court referred to *Bradley* v. *Fisher*, 13 Wall. 335 (1872), which the Court described as holding that "judges of courts of superior or general jurisdiction [are] not liable to civil suits for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 161 U. S., at 493. The Court was of the view that "the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law." *Id.*, at 498. The Court plainly applied *Bradley* v. *Fisher* principles in holding that proof of malice would not subject an executive officer to liability for performing an act which he was authorized to perform by federal law. These principles, however, were not said to be completely applicable; and, as indicated in the text, the Court revealed no intention to overrule *Kendall* v. *Stokes* or *Wilkes* or to immunize an officer from liability for a willful misapplication of his authority. Also, on the face of the *Spalding* opinion, it would appear that an executive officer would be vulnerable if he took action "manifestly or palpably" beyond his authority or ignored a clear limitation on his enforcement powers.

[19] MR. JUSTICE BRENNAN, dissenting in *Barr* v. *Matteo*, 360 U. S., at 587 n. 3, emphasized this point:

"The suit in *Spalding* seems to have been as much, if not more, a suit for malicious interference with advantageous relationships as a libel suit. The Court reviewed the facts and found no false statement. See 161 U. S., at 487–493. The case may stand for no more than the proposition that where a Cabinet officer publishes a statement, not factually inaccurate, relating to a matter within his Department's competence, he can-

who ignore limitations on their authority imposed by law. Although the "manifestly or palpably" standard for examining the reach of official power may have been suggested as a gloss on *Barreme*, *Bates*, *Kendall*, and *Wilkes*, none of those cases was overruled.[20] It is also evident that *Spalding* presented no claim that the officer was liable in damages because he had acted in violation of a limitation placed upon his conduct by the United States Constitution. If any inference is to be drawn from *Spalding* in any of these respects, it is that the official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute.

Insofar as cases in this Court dealing with the immunity or privilege of federal officers are concerned,[21] this is where the matter stood until *Barr* v. *Matteo*. There, as we have set out above, immunity was granted even though the publication contained a factual error, which was not the case in *Spalding*. The plurality opinion and judgment in *Barr* also appear—

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not be charged with improper motives in publication. The Court's opinion leaned heavily on the fact that the contents of the statement (which were not on their face defamatory) were quite accurate, in support of its conclusion that publishing the statement was within the officer's discretion, foreclosing inquiry into his motives. *Id.*, at 489–493."

The *Barr* plurality did not disagree with this characterization of the lawsuit in *Spalding*. See also Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 336 (1959).

[20] Indeed, *Barreme* and *Bates* were cited with approval in a decision that was under submission with *Spalding* and was handed down a scant month before the judgment in *Spalding* was announced. *Belknap* v. *Schild*, 161 U. S. 10, 18 (1896).

[21] During the period prior to *Barr*, the lower federal courts broadly extended *Spalding* in according absolute immunity to federal officials sued for common-law torts. *E. g.*, *Jones* v. *Kennedy*, 73 App. D. C. 292, 121 F. 2d 40, cert. denied, 314 U. S. 665 (1941); *Papagianakis* v. *The Samos*, 186 F. 2d 257 (CA4 1950), cert. denied, 341 U. S. 921 (1951). See cases collected in Gray, *supra* n. 19, at 337–338.

although without any discussion of the matter—to have extended absolute immunity to an officer who was authorized to issue press releases, who was assumed to know that the press release he issued was false and who therefore was deliberately misusing his authority. Accepting this extension of immunity with respect to state tort claims, however, we are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution.[22] Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

The liability of officials who have exceeded constitutional limits was not confronted in either *Barr* or *Spalding*. Neither of those cases supports the Government's position. Beyond that, however, neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

Although it is true that the Court has not dealt with this

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[22] We view this case, in its present posture, as concerned only with constitutional issues. The District Court memorandum focused exclusively on respondent's constitutional claims. It appears from the language and reasoning of its opinion that the Court of Appeals was also essentially concerned with respondent's constitutional claims. See, *e. g.*, 535 F. 2d, at 695 n. 7. The Second Circuit has subsequently read *Economou* as limited to that context. See *Huntington Towers, Ltd.* v. *Franklin Nat. Bank*, 559 F. 2d 863, 870, and n. 2 (1977), cert. denied *sub nom. Huntington Towers, Ltd.* v. *Federal Reserve Bank of N. Y.*, 434 U. S. 1012 (1978). The argument before us as well has focused on respondent's constitutional claims, and our holding is so limited.

issue with respect to federal officers,[23] we have several times addressed the immunity of state officers when sued under 42 U. S. C. § 1983 for alleged violations of constitutional rights. These decisions are instructive for present purposes.

III

Pierson v. *Ray*, 386 U. S. 547 (1967), decided that § 1983 was not intended to abrogate the immunity of state judges which existed under the common law and which the Court had held applicable to federal judges in *Bradley* v. *Fisher*, 13 Wall. 335 (1872). *Pierson* also presented the issue "whether immunity was available to that segment of the executive branch of a state government that is . . . most frequently exposed to situations which can give rise to claims under § 1983—the local police officer." *Scheuer* v. *Rhodes*, 416 U. S., at 244–245. Relying on the common law, we held that police officers were entitled to a defense of "good faith and probable cause," even though an arrest might subsequently be proved to be unconstitutional. We observed, however, that "[t]he common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one." 386 U. S., at 555.

In *Scheuer* v. *Rhodes*, *supra*, the issue was whether "higher officers of the executive branch" of state governments were immune from liability under § 1983 for violations of constitutionally protected rights. 416 U. S., at 246. There, the Governor of a State, the senior and subordinate officers of the state National Guard, and a state university president had been sued on the allegation that they had suppressed a civil dis-

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[23] *Doe* v. *McMillan*, 412 U. S. 306 (1973), did involve a constitutional claim for invasion of privacy—but in the special context of the Speech or Debate Clause. The Court held that the executive officials would be immune from suit only to the extent that the legislators at whose behest they printed and distributed the documents could claim the protection of the Speech or Debate Clause.

turbance in an unconstitutional manner. We explained that the doctrine of official immunity from § 1983 liability, although not constitutionally grounded and essentially a matter of statutory construction, was based on two mutually dependent rationales:

> "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." 416 U. S., at 240.

The opinion also recognized that executive branch officers must often act swiftly and on the basis of factual information supplied by others, constraints which become even more acute in the "atmosphere of confusion, ambiguity, and swiftly moving events" created by a civil disturbance. *Id.*, at 246–247. Although quoting at length from *Barr* v. *Matteo*,[24] we did not believe that there was a need for absolute immunity from § 1983 liability for these high-ranking state officials. Rather the considerations discussed above indicated:

> "[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the

[24] 416 U. S., at 247, quoting *Barr* v. *Matteo*, 360 U. S., at 573–574. The Court spoke of *Barr* v. *Matteo* as arising "[i]n a context other than a § 1983 suit." 416 U. S., at 247. Elsewhere in the opinion, however, the Court discussed *Barr* as arising "in the somewhat parallel context of the privilege of public officers from defamation actions." 416 U. S., at 242. The Court also relied on *Spalding* v. *Vilas*, 161 U. S. 483 (1896), without mentioning that that decision concerned federal officials. 416 U. S., at 242 n. 7, 246 n. 8.

existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U. S., at 247–248.

Subsequent decisions have applied the *Scheuer* standard in other contexts. In *Wood* v. *Strickland*, 420 U. S. 308 (1975), school administrators were held entitled to claim a similar qualified immunity. A school board member would lose his immunity from a § 1983 suit only if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." 420 U. S., at 322. In *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), we applied the same standard to the superintendent of a state hospital. In *Procunier* v. *Navarette*, 434 U. S. 555 (1978), we held that prison administrators would be adequately protected by the qualified immunity outlined in *Scheuer* and *Wood*. We emphasized, however, that, at least in the absence of some showing of malice, an official would not be held liable in damages under § 1983 unless the constitutional right he was alleged to have violated was "clearly established" at the time of the violation.

None of these decisions with respect to state officials furnishes any support for the submission of the United States that federal officials are absolutely immune from liability for their constitutional transgressions. On the contrary, with impressive unanimity, the Federal Courts of Appeals have concluded that federal officials should receive no greater degree of protection from *constitutional* claims than their counterparts in state government.[25] Subsequent to *Scheuer*, the

[25] As early as 1971, Judge, now Attorney General, Bell, concurring specially in a judgment of the Court of Appeals for the Fifth Circuit,

Court of Appeals for the Fourth Circuit concluded that "[a]lthough *Scheuer* involved a suit against state executive officers, the court's discussion of the qualified nature of executive immunity would appear to be equally applicable to federal executive officers." *States Marine Lines* v. *Shultz*, 498 F. 2d 1146, 1159 (1974). In the view of the Court of Appeals for the Second Circuit,

> "it would be 'incongruous and confusing, to say the least' to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution." *Economou* v. *U. S. Dept. of Agriculture*, 535 F. 2d, at 695 n. 7, quoting *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 456 F. 2d 1339, 1346–1347 (CA2 1972) (on remand).[26]

The Court of Appeals for the Ninth Circuit has reasoned:

> "[Defendants] offer no significant reason for distinguishing, as far as the immunity doctrine is concerned, between litigation under § 1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal question statute. In contrast, the practical advantage of having just *one* fed-

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recorded his "continuing belief that all police and ancillary personnel in this nation, whether state or federal, should be subject to the same accountability under law for their conduct." *Anderson* v. *Nosser*, 438 F. 2d 183, 205 (1971). He objected to the notion that there should be "one law for Athens and another for Rome." *Ibid.* It appears from a recent decision that the Fifth Circuit has abandoned the view he criticized. See *Weir* v. *Muller*, 527 F. 2d 872 (1976).

[26] Courts and judges have noted the "incongruity" that would arise if officials of the District of Columbia, who are not subject to § 1983, were given absolute immunity while their counterparts in state government received qualified immunity. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 456 F. 2d, at 1347; *Carter* v. *Carlson*, 144 U. S. App. D. C. 388, 401, 447 F. 2d 358, 371 (1971) (Nichols, J., concurring), rev'd on other grounds *sub nom. District of Columbia* v. *Carter*, 409 U. S. 418 (1973).

eral immunity doctrine for suits arising under federal law is self-evident. Further, the rights at stake in a suit brought directly under the Bill of Rights are no less worthy of full protection than the constitutional and statutory rights protected by § 1983." *Mark* v. *Groff*, 521 F. 2d 1376, 1380 (1975).

Other courts have reached similar conclusions. *E. g.*, *Apton* v. *Wilson*, 165 U. S. App. D. C. 22, 506 F. 2d 83 (1974); *Brubaker* v. *King*, 505 F. 2d 534 (CA7 1974); see *Weir* v. *Muller*, 527 F. 2d 872 (CA5 1976); *Paton* v. *La Prade*, 524 F. 2d 862 (CA3 1975); *Jones* v. *United States*, 536 F. 2d 269 (CA8 1976); *G. M. Leasing Corp.* v. *United States*, 560 F. 2d 1011 (CA10 1977).[27]

We agree with the perception of these courts that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials.[28] We see no sense

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[27] The First and Sixth Circuits have recently accorded immunity to federal officials sued for common-law torts, without discussion of their views with respect to constitutional claims. *Berberian* v. *Gibney*, 514 F. 2d 790 (CA1 1975); *Mandel* v. *Nouse*, 509 F. 2d 1031 (CA6 1975).

[28] In *Apton* v. *Wilson*, 165 U. S. App. D. C. 22, 32, 506 F. 2d 83, 93 (1974), Judge Leventhal compared the Governor of a State with the highest officers of a federal executive department:

"The difference in office is relevant, for immunity depends in part upon 'scope of discretion and responsibilities of the office,' *Scheuer* v. *Rhodes*, *supra*, 416 U. S., at 247 . . . . But the difference is not conclusive in this case. Like the highest executive officer of a state, the head of a Federal executive department has broad discretionary authority. Each is called

in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers.

The Government argues that the cases involving state officials are distinguishable because they reflect the need to preserve the effectiveness of the right of action authorized by § 1983. But as we discuss more fully below, the cause of action recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), would similarly be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional transgressions. Cf. *Scheuer* v. *Rhodes*, 416 U. S., at 248.

Moreover, the Government's analysis would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity. It has been observed more than once that the law of privilege as a defense to damages actions against officers of Government has "in large

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upon to act under circumstances where judgments are tentative and an unambiguously optimal course of action can be ascertained only in retrospect. Both officials have functions and responsibilities concerned with maintaining the public order; these may impel both officials to make decisions 'in an atmosphere of confusion, ambiguity, and swiftly moving events.' *Scheuer* v. *Rhodes*, *supra*, 416 U. S., at 247 . . . . Having a wider territorial responsibility than the head of a state government, a Federal cabinet officer may be entitled to consult fewer sources and expend less effort inquiring into the circumstances of a localized problem. But these considerations go to the showing an officer vested with a qualified immunity must make in support of 'good faith belief;' they do not make the qualified immunity itself inappropriate. The head of an executive department, no less than the chief executive of a state, is adequately protected by a qualified immunity."

part been of judicial making." *Barr* v. *Matteo*, 360 U. S., at 569; *Doe* v. *McMillan*, 412 U. S. 306, 318 (1973). Section 1 of the Civil Rights Act of 1871 [29]—the predecessor of § 1983—said nothing about immunity for state officials. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law.[30] This

[29] Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, provided in pertinent part:

"[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law . . . ."

[30] The purpose of § 1 of the Civil Rights Act was not to abolish the immunities available at common law, see *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967), but to insure that federal courts would have jurisdiction of constitutional claims against state officials. We explained in *District of Columbia* v. *Carter*, 409 U. S., at 427–428:

"At the time this Act was adopted, . . . there existed no general federal-question jurisdiction in the lower federal courts. Rather, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws.' *Zwickler* v. *Koota*, 389 U. S. 241, 245 (1967). With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials." (Footnotes omitted.)

The situation with respect to federal officials was entirely different: They were already subject to judicial control through the state courts, which were not particularly sympathetic to federal officials, or through the removal jurisdiction of the federal courts. See generally *Willingham* v. *Morgan*, 395 U. S. 402 (1969); *Tennessee* v. *Davis*, 100 U. S. 257 (1880). Moreover, in 1875 Congress vested the circuit courts with general federal-question jurisdiction, which encompassed many suits against federal officials. 18 Stat. 470. Thus, the absence of a statute similar to § 1983 pertaining to federal officials cannot be the basis for an inference about the level of immunity appropriate to federal officials.

Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from § 1983 liability in a variety of contexts. *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976); *Scheuer* v. *Rhodes*, *supra*. The federal courts are equally competent to determine the appropriate level of immunity where the suit is a direct claim under the Federal Constitution against a federal officer.

The presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution. In *Bivens*, the Court noted the "absence of affirmative action by Congress" and therefore looked for "special factors counselling hesitation." 403 U. S., at 396. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages, *id.*, at 397, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim, see *id.*, at 409 (Harlan, J., concurring in judgment).

But once this analysis is completed, there is no reason to return again to the absence of congressional authorization in resolving the question of immunity. Having determined that the plaintiff is entitled to a remedy in damages for a constitutional violation, the court then must address how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department. Since our decision in *Scheuer* was intended to guide the federal courts in resolving this tension in the myriad factual situations in which it might arise, we see no reason why it should not supply the governing principles for resolving this dilemma in the case of federal officials. The Court's opinion in *Scheuer* relied on precedents dealing with federal as well as state officials, analyzed the issue of executive im-

munity in terms of general policy considerations, and stated its conclusion, quoted *supra*, in the same universal terms. The analysis presented in that case cannot be limited to actions against state officials.

Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

IV

As we have said, the decision in *Bivens* established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official. As Mr. Justice Harlan, concurring in the judgment, pointed out, the action for damages recognized in *Bivens* could be a vital means of providing redress for persons whose constitutional rights have been violated. The barrier of sovereign immunity is frequently impenetrable.[31] Injunctive or declaratory relief is useless to a person who has already been injured. "For

[31] At the time of the *Bivens* decision, the Federal Tort Claims Act prohibited recovery against the Government for

"Any claim arising out of assault, battery, false imprisonment, false arrest,

people in Bivens' shoes, it is damages or nothing." 403 U. S., at 410.

Our opinion in *Bivens* put aside the immunity question; but we could not have contemplated that immunity would be absolute.[32] If, as the Government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs. Moreover, no compensation would be available from the Government, for the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused.[33]

The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects—including some which may infringe such important personal interests as liberty, property, and free speech. It makes

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malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U. S. C. § 2680 (h).

The statute was subsequently amended in light of *Bivens* to lift the bar against some of these claims when arising from the act of federal law enforcement officers. See 28 U. S. C. § 2680 (h) (1976 ed.).

[32] Mr. Justice Harlan, the author of the plurality opinion in *Barr*, noted that although "interests in efficient law enforcement . . . argue for a protective zone with respect to many types of Fourth Amendment violations . . . at the very least . . . a remedy would be available for the most flagrant and patently unjustified sorts of police conduct." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S., at 411 (concurring in judgment).

[33] Pursuant to 28 U. S. C. § 2680 (1976 ed.), the Government is immune from

"(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

See generally *Dalehite* v. *United States*, 346 U. S. 15 (1953).

little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States* v. *Lee*, 106 U. S., at 220.

See also *Marbury* v. *Madison*, 1 Cranch 137 (1803); *Scheuer* v. *Rhodes*, 416 U. S., at 239–240. In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

This is not to say that considerations of public policy fail to support a limited immunity for federal executive officials. We consider here, as we did in *Scheuer*, the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Yet *Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not

unduly interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer,* subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.[34]

The *Scheuer* principle of only qualified immunity for constitutional violations is consistent with *Barr* v. *Matteo,* 360 U. S. 564 (1959), *Spalding* v. *Vilas,* 161 U. S. 483 (1896), and *Kendall* v. *Stokes,* 3 How. 87 (1847). Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law. But we see no substantial basis for holding, as the United States would have us do, that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule. The principle should prove as workable in suits against federal officials as it has in the context of suits against state officials. Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive

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[34] The Government argued in *Bivens* that the plaintiff should be relegated to his traditional remedy at state law. "In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals." 403 U. S., at 390–391. Although, as this passage makes clear, traditional doctrine did not accord immunity to officials who transgressed constitutional limits, we believe that federal officials sued by such traditional means should similarly be entitled to a *Scheuer* immunity.

a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity.[35] See 416 U. S., at 250. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

V

Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, our decisions recognize that there are some officials whose special functions require a full exemption from liability. *E. g., Bradley* v. *Fisher,* 13 Wall. 335 (1872); *Imbler* v. *Pachtman,* 424 U. S. 409 (1976). In each case, we have undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.,* at 421.

In *Bradley* v. *Fisher,* the Court analyzed the need for absolute immunity to protect judges from lawsuits claiming that their decisions had been tainted by improper motives. The Court began by noting that the principle of immunity for acts done by judges "in the exercise of their judicial functions" had been "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country." 13 Wall., at 347. The Court explained that the value of this rule was proved by experience.

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[35] The defendant official may also be able to assert on summary judgment some other common-law or constitutional privilege. For example, in this case the defendant officials may be able to argue that their issuance of the press release was privileged as an accurate report on a matter of public record in an administrative proceeding. See Handler & Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials, 74 Harv. L. Rev. 44, 61–62, 75–76 (1960). Of course, we do not decide this issue at this time.

Judges were often called to decide "[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings." *Id.*, at 348. Such adjudications invariably produced at least one losing party, who would "accep[t] anything but the soundness of the decision in explanation of the action of the judge." *Ibid.* "Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge." *Ibid.* If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose "that independence without which no judiciary can either be respectable or useful." *Id.*, at 347. Thus, judges were held to be immune from civil suit "for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction." *Id.*, at 354.[36]

The principle of *Bradley* was extended to federal prosecutors through the summary affirmance in *Yaselli* v. *Goff*, 275 U. S. 503 (1927), aff'g 12 F. 2d 396 (CA2 1926). The Court of Appeals in that case discussed in detail the common-law precedents extending absolute immunity to parties participating in the judicial process: judges, grand jurors, petit jurors, advocates, and witnesses. Grand jurors had received absolute immunity " 'lest they should be biased with the fear of being

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[36] In *Pierson* v. *Ray*, 386 U. S. 547 (1967), we recognized that state judges sued on constitutional claims pursuant to § 1983 could claim a similar absolute immunity. The Court reasoned:

"It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Id.*, at 554.

harassed by a vicious suit for acting according to their consciences (the danger of which might easily be insinuated where powerful men are warmly engaged in a cause and thoroughly prepossessed of the justice of the side which they espouse).'" *Id.*, at 403, quoting 1 W. Hawkins, Pleas of the Crown 349 (6th ed. 1787). The court then reasoned that "'[t]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury.'" 12 F. 2d, at 404, quoting *Smith* v. *Parman*, 101 Kan. 115, 116, 165 P. 663 (1917). The court held the prosecutor in that case immune from suit for malicious prosecution and this Court, citing *Bradley* v. *Fisher*, *supra*, affirmed.

We recently reaffirmed the holding of *Yaselli* v. *Goff* in *Imbler* v. *Pachtman*, *supra*, a suit against a state prosecutor under § 1983. The Court's examination of the leading precedents led to the conclusion that "[t]he common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." 424 U. S., at 422–423. The prosecutor's role in the criminal justice system was likely to provoke "with some frequency" retaliatory suits by angry defendants. *Id.*, at 425. A qualified immunity might have an adverse effect on the functioning of the criminal justice system, not only by discouraging the initiation of prosecutions, see *id.*, at 426 n. 24, but also by affecting the prosecutor's conduct of the trial.

> "Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. . . . If prosecutors were hampered in exercising their judgment as to the use of . . . witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." *Id.*, at 426.

In light of these and other practical considerations, the Court held that the defendant in that case was entitled to absolute immunity with respect to his activities as an advocate, "activities [which] were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.*, at 430.[37]

Despite these precedents, the Court of Appeals concluded that all of the defendants in this case—including the Chief Hearing Examiner, Judicial Officer, and prosecuting attorney—were entitled to only a qualified immunity. The Court of Appeals reasoned that officials within the Executive Branch generally have more circumscribed discretion and pointed out that, unlike a judge, officials of the Executive Branch would face no conflict of interest if their legal representation was provided by the Executive Branch. The Court of Appeals recognized that "some of the Agriculture Department officials may be analogized to criminal prosecutors, in that they initiated the proceedings against [respondent], and presented evidence therein," 535 F. 2d, at 696 n. 8, but found that attorneys in administrative proceedings did not face the same "serious constraints of time and even information" which this Court has found to be present frequently in criminal cases. See *Imbler* v. *Pachtman*, 424 U. S., at 425.

We think that the Court of Appeals placed undue emphasis on the fact that the officials sued here are—from an administrative perspective—employees of the Executive Branch. Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities. This point is underlined by the fact that prosecutors—themselves members of the Exec-

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[37] The *Imbler* Court specifically reserved the question "whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." 424 U. S., at 430–431.

utive Branch—are also absolutely immune. "It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." *Id.*, at 423 n. 20.

The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley* Court suggested, 13 Wall., at 348–349, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson* v. *Ray*, 386 U. S., at 554. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

At the same time, the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges.[38] Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.

We think that adjudication within a federal administrative

[38] See generally Handler & Klein, *supra* n. 35, at 54–55.

agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. The conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court. As the *Bradley* opinion points out: "When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of [malice]." 13 Wall., at 348. Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. See 5 U. S. C. § 555 (b) (1976 ed.). They are conducted before a trier of fact insulated from political influence. See § 554 (d). A party is entitled to present his case by oral or documentary evidence, § 556 (d), and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. § 556 (e). The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record. § 557 (c).

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See § 556 (c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because

they were required to perform prosecutorial and investigative functions as well as their judicial work, see, *e. g., Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36–41 (1950), and because they were often subordinate to executive officials within the agency, see *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U. S. 128, 131 (1953). Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication," Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 U. S. C. § 3105 (1976 ed.). When conducting a hearing under § 5 of the APA, 5 U. S. C. § 554 (1976 ed.), a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. 5 U. S. C. § 554 (d)(2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. § 554 (d)(1). Hearing examiners must be assigned to cases in rotation so far as is practicable. § 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. § 7521. Their pay is also controlled by the Civil Service Commission.

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.

We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. The Commodity Futures Trading Commission, for example, may initiate proceedings whenever it has "reason to believe" that any person "is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission." 7 U. S. C. § 9 (1976 ed.). A range of sanctions is open to it. *Ibid.*

The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. Cf. *Imbler* v. *Pachtman,* 424 U. S., at 426 n. 24. While there is not likely to be anyone willing and legally able to seek damages from the officials if they do *not* authorize the administrative proceeding, cf. *id.*, at 438 (WHITE, J., concurring in judgment), there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts. A corporation will muster all of its financial and legal resources in an effort to prevent administrative sanctions. "When millions may turn on regulatory decisions, there is a strong incentive to counter-attack." [39]

The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding. An

[39] *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution,* 184 U. S. App. D. C. 397, 401, 566 F. 2d 289, 293 (1977), cert. pending, No. 76–418.

administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified. His claims that the proceeding is unconstitutional may also be heard by the courts. Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review. See *Economou* v. *U. S. Department of Agriculture*, 494 F. 2d 519 (CA2 1974).

We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

We turn finally to the role of an agency attorney in conducting a trial and presenting evidence on the record to the trier of fact. We can see no substantial difference between the function of the agency attorney in presenting evidence in an agency hearing and the function of the prosecutor who brings evidence before a court.[40] In either case, the evidence

[40] That prosecutors act under "serious constraints of time and even information" was not central to our decision in *Imbler*, for the same might be said of a wide variety of state and federal officials who enjoy only qualified immunity. See *Scheuer* v. *Rhodes*, 416 U. S., at 246–247. Nor do we think that administrative enforcement proceedings may be distinguished from criminal prosecutions on the ground that the former often turn on documentary proof. The key point is that administrative personnel, like prosecutors, "often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence." *Imbler*, 424 U. S., at 426 n. 24. The complexity and quantity of documentary proof that may be adduced in a full-scale enforcement proceeding may make this decision even more difficult than the decision to prosecute a suspect.

will be subject to attack through cross-examination, rebuttal, or reinterpretation by opposing counsel. Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact. If agency attorneys were held personally liable in damages as guarantors of the quality of their evidence, they might hesitate to bring forward some witnesses or documents. "This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present." *Imbler* v. *Pachtman, supra,* at 440 (WHITE, J., concurring in judgment). Apart from the possible unfairness to agency personnel, the agency would often be denied relevant evidence. Cf. *Imbler* v. *Pachtman, supra,* at 426. Administrative agencies can act in the public interest only if they can adjudicate on the basis of a complete record. We therefore hold that an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence.

VI

There remains the task of applying the foregoing principles to the claims against the particular petitioner-defendants involved in this case. Rather than attempt this here in the first instance, we vacate the judgment of the Court of Appeals and remand the case to that court with instructions to remand the case to the District Court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS join, concurring in part and dissenting in part.

I concur in that part of the Court's judgment which affords absolute immunity to those persons performing adjudicatory functions within a federal agency, *ante,* at 514,

those who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication, *ante*, at 516, and those agency personnel who present evidence on the record in the course of an adjudication, *ante*, at 517. I cannot agree, however, with the Court's conclusion that in a suit for damages arising from allegedly unconstitutional action federal executive officials, regardless of their rank or the scope of their responsibilities, are entitled to only qualified immunity even when acting within the outer limits of their authority. The Court's protestations to the contrary notwithstanding, this decision seriously misconstrues our prior decisions, finds little support as a matter of logic or precedent, and perhaps most importantly, will, I fear, seriously "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949) (Learned Hand, J.).

Most noticeable is the Court's unnaturally constrained reading of the landmark case of *Spalding* v. *Vilas*, 161 U. S. 483 (1896). The Court in that case did indeed hold that the actions taken by the Postmaster General were within the authority conferred upon him by Congress, and went on to hold that even though he had acted maliciously in carrying out the duties conferred upon him by Congress he was protected by official immunity. But the Court left no doubt that it would have reached the same result had it been alleged the official acts were unconstitutional.

> "We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be

> accorded to them in respect of their official acts." *Id.*, at 498.

The Court today attempts to explain away that language by observing that *Spalding* indicated no intention to overrule *Kendall* v. *Stokes*, 3 How. 87 (1845), or *Wilkes* v. *Dinsman*, 7 How. 89 (1849). See *ante*, at 493 n. 18. But as the Court itself observes, the Postmaster General was held *not* "liable in an action for an error of judgment" in *Kendall*, *supra*, at 98. The Court in *Wilkes*, *supra*, likewise exonerated the defendant. The Court did indicate in dictum in both those cases that a federal officer might be liable if he acted with malice, *Kendall*, *supra*, at 99; *Wilkes*, *supra*, at 131, but the holding in *Spalding* was, as even the Court is forced to admit today, see *ante*, at 492–493, directly contrary to those cases on that point. In short, *Spalding* clearly and inescapably stands for the proposition that high-ranking executive officials acting within the outer limits of their authority are absolutely immune from suit.

Indeed, the language from *Spalding* quoted above unquestionably applies with equal force in the case at bar. No one seriously contends that the Secretary of Agriculture or the Assistant Secretary, who are being sued for $32 million in damages, had wandered completely off the official reservation in authorizing prosecution of respondent for violation of regulations promulgated by the Secretary for the regulation of "futures commission merchants," 7 U. S. C. § 6 (1976 ed.). This is precisely what the Secretary and his assistants were empowered and required to do. That they would on occasion be mistaken in their judgment that a particular merchant had in fact violated the regulations is a necessary concomitant of any known system of administrative adjudication; that they acted "maliciously" gives no support to respondent's claim against them unless we are to overrule *Spalding*.

The Court's attempt to distinguish *Spalding* may be predi-

cated on a simpler but equally erroneous concept of immunity. At one point the Court observes that even under *Spalding* "an executive officer would be vulnerable if he took action 'manifestly or palpably' beyond his authority or ignored a clear limitation on his enforcement powers." *Ante*, at 493 n. 18. From that proposition, which is undeniably accurate, the Court appears to conclude that anytime a plaintiff can paint his grievance in constitutional colors, the official is subject to damages unless he can prove he acted in good faith. After all, Congress would never "authorize" an official to engage in unconstitutional conduct. That this notion in fact underlies the Court's decision is strongly suggested by its discussion of numerous cases which supposedly support its position, but all of which in fact deal not with the question of what level of immunity a federal official may claim when acting within the outer limits of his authority, but rather with the question of whether he was in fact so acting. See *ante*, at 489–491.

Putting to one side the illogic and impracticability of distinguishing between constitutional and common-law claims for purposes of immunity, which will be discussed shortly, this sort of immunity analysis badly misses the mark. It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: The "immunity" disappears at the very moment when it is needed. The critical inquiry in determining whether an official is entitled to claim immunity is not whether someone has in fact been injured by his action; that is part of the plaintiff's case in chief. The immunity defense turns on whether the action was one taken "when engaged in the discharge of duties imposed upon [the official] by law," *Spalding*, 161 U. S., at 498, or in other words, whether the official was acting within the outer bounds of his authority. Only if the immunity inquiry is approached in this manner does it have any meaning. That such a rule may occasionally result in individual injustices has never been doubted, but at least until

today, immunity has been accorded nevertheless. As Judge Learned Hand said in *Gregoire* v. *Biddle*, 177 F. 2d, at 581:

> "The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . ."

Indeed, in that very case Judge Hand laid bare the folly of approaching the question of immunity in the manner suggested today by the Court.

> "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the

whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." *Ibid.*

Barr v. *Matteo*, 360 U. S. 564 (1959), unfortunately fares little better at the Court's hand than *Spalding*. Here the Court at least recognizes and reaffirms the minimum proposition for which *Barr* stands—that executive officials are absolutely immune at least from actions predicated on common-law claims as long as they are acting within the outer limits of their authority. See *ante*, at 495. *Barr* is distinguished, however, on the ground that it did not involve a violation of "those fundamental principles of fairness embodied in the Constitution." *Ibid.* But if we allow a mere allegation of unconstitutionality, obviously unproved at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such an action on the merits, the defense of official immunity will have been abolished in fact if not in form. The ease with which a constitutional claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. The result can only be damage to the "interests of the people," *Spalding, supra*, at 498, which "require[s] that due protection be accorded to [Cabinet officials] in respect of their official acts."

It likewise cannot seriously be argued that an official will be less deterred by the threat of liability for unconstitutional

conduct than for activities which might constitute a common-law tort. The fear that inhibits is that of a long, involved lawsuit and a significant money judgment, not the fear of liability for a certain type of claim. Thus, even viewing the question functionally—indeed, *especially* viewing the question functionally—the basis for a distinction between constitutional and common-law torts in this context is open to serious question. Even the logical justification for raising such a novel distinction is far from clear. That the Framers thought some rights sufficiently susceptible of legislative derogation that they should be enshrined in the Constitution does not necessarily indicate that the Framers likewise intended to establish an immutable hierarchy of rights in terms of their importance to individuals. The most heinous common-law tort surely cannot be less important to, or have less of an impact on, the aggrieved individual than a mere technical violation of a constitutional proscription.

The Court purports to find support for this distinction, and therefore this result, in the principles supposedly underlying *Marbury* v. *Madison*, 1 Cranch 137 (1803) and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), and the fact that cognate state officials are not afforded absolute immunity for actions brought under 42 U. S. C. § 1983. Undoubtedly these rationales have some superficial appeal, but none withstands careful analysis. *Marbury* v. *Madison*, *supra*, leaves no doubt that the high position of a Government official does not insulate his actions from judicial review. But that case, like numerous others which have followed, involved equitable-type relief by way of mandamus or injunction. In the present case, respondent sought damages in the amount of $32 million. There is undoubtedly force to the argument that injunctive relief, in these cases where a court determines that an official defendant has violated a legal right of the plaintiff, sets the matter right only as to the future. But there is at least as much force to the argument

that the threat of injunctive relief without the possibility of damages in the case of a Cabinet official is a better tailoring of the competing need to vindicate individual rights, on the one hand, and the equally vital need, on the other, that federal officials exercising discretion will be unafraid to take vigorous action to protect the public interest.

The Court also suggests in sweeping terms that the cause of action recognized in *Bivens* would be " 'drained of meaning' if federal officials were entitled to absolute immunity for their constitutional transgressions." *Ante,* at 501. But *Bivens* is a slender reed on which to rely when abrogating official immunity for Cabinet-level officials. In the first place, those officials most susceptible to claims under *Bivens* have historically been given only a qualified immunity. As the Court observed in *Pierson* v. *Ray,* 386 U. S. 547, 555 (1967), "[t]he common law has never granted police officers an absolute and unqualified immunity . . . ." In any event, it certainly does not follow that a grant of absolute immunity to the Secretary and Assistant Secretary of Agriculture requires a like grant to federal law enforcement officials. But even more importantly, on the federal side, when Congress thinks redress of grievances is appropriate, it can and generally does waive sovereign immunity, allowing an action directly against the United States. This allows redress for deprivations of rights, while at the same time limiting the outside influences which might inhibit an official in the free and considered exercise of his official powers. In fact, Congress, making just these sorts of judgments with respect to the very causes of action which the Court suggests require abrogation of absolute immunity, has amended the Federal Tort Claims Act, see 28 U. S. C. § 2680 (h) (1976 ed.), to allow suits against the United States on the basis of certain intentional torts if committed by federal "investigative or law enforcement officers."

The Court also looks to the question of immunity of state officials for causes arising under § 1983 and, quoting a con-

curring opinion in *Anderson* v. *Nosser*, 438 F. 2d 183, 205 (CA5 1971), to the effect that there should not be "one law for Athens and another for Rome," finds no reason why those principles should not likewise apply when federal officers are the target. Homilies cannot replace analysis in this difficult area, however. And even a moment's reflection on the nature of the *Bivens*-type action and the purposes of § 1983, as made abundantly clear in this Court's prior cases, supplies a compelling reason for distinguishing between the two different situations. In the first place, as made clear above, a grant of absolute immunity to high-ranking executive officials on the federal side would not eviscerate the cause of action recognized in *Bivens*. The officials who are the most likely defendants in a *Bivens*-type action have generally been accorded only a qualified immunity. But more importantly, Congress has expressly waived sovereign immunity for this type of suit. This permits a direct action against the Government, while limiting those risks which might "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." And the Federal Government can internally supervise and check its own officers. The Federal Government is not so situated that it can control state officials or strike this same balance, however. Hence the necessity of § 1983 and the differing standards of immunity. As the Court observed in *District of Columbia* v. *Carter*, 409 U. S. 418 (1973):

> "Although there are threads of many thoughts running through the debates on the 1871 Act, it seems clear that § 1 of the Act, with which we are here concerned, was designed primarily in response to unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others." *Id.*, at 426.
>
> "[T]he [basic] rationale underlying Congress' decision not to enact legislation similar to § 1983 with respect to

> federal officials [was] the assumption that the Federal Government could keep its own officers under control . . . ." *Id.*, at 429–430.

The Court attempts to avoid the force of this argument by suggesting that the statute which vests federal courts with general federal-question jurisdiction is basically the equivalent of § 1983. *Ante*, at 502 n. 30. But that suggestion evinces a basic misunderstanding of the difference between a statute which vests jurisdiction in federal courts, which are, as a constitutional matter, courts of limited jurisdiction, and a statute, or even a constitutional provision, which creates a private right of action. As even the Court's analysis in *Bivens* made clear, a statute giving jurisdiction to federal courts does not, in and of itself, create a right of action. And to date, the Court has not held that the Constitution itself creates a private right of action for damages except when federal law enforcement officials arrest someone and search his premises in violation of the Fourth Amendment. Thus, the Court's attempt to equate § 1983 and 28 U. S. C. § 1331 (1976 ed.) simply fails, and its further observation—that there should be no difference in immunity between state and federal officials—remains subject to serious doubt.

My biggest concern, however, is not with the illogic or impracticality of today's decision, but rather with the potential for disruption of Government that it invites. The steady increase in litigation, much of it directed against governmental officials and virtually all of which could be framed in constitutional terms, cannot escape the notice of even the most casual observer. From 1961 to 1977, the number of cases brought in the federal courts under civil rights statutes increased from 296 to 13,113. See Director of the Administrative Office of the United States Courts Ann. Rep. 189, Table 11 (1977); Ann. Rep. 173, Table 17 (1976). It simply defies logic and common experience to suggest that officials will not have this in the back of their minds when considering

what official course to pursue. It likewise strains credulity to suggest that this threat will only inhibit officials from taking action which they should not take in any event. It is the cases in which the grounds for action are doubtful, or in which the actor is timid, which will be affected by today's decision.

The Court, of course, recognizes this problem and suggests two solutions. First, judges, ever alert to the artful pleader, supposedly will weed out insubstantial claims. *Ante,* at 507. That, I fear, shows more optimism than prescience. Indeed, this very case, unquestionably frivolous in the extreme, belies any hope in that direction. And summary judgment on affidavits and the like is even more inappropriate when the central, and perhaps only, inquiry is the official's state of mind. See C. Wright, Law of Federal Courts 493 (3d ed. 1976) (It "is not feasible to resolve on motion for summary judgment cases involving state of mind"); *Subin* v. *Goldsmith,* 224 F. 2d 753 (CA2 1955).

The second solution offered by the Court is even less satisfactory. The Court holds that in those special circumstances "where it is demonstrated that absolute immunity is essential for the conduct of the public business," absolute immunity will be extended. *Ante,* at 507. But this is a form of "absolute immunity" which in truth exists in name only. If, for example, the Secretary of Agriculture may never know until inquiry by a trial court whether there is a possibility that vexatious constitutional litigation will interfere with his decisionmaking process, the Secretary will obviously think not only twice but thrice about whether to prosecute a litigious commodities merchant who has played fast and loose with the regulations for his own profit. Careful consideration of the rights of every individual subject to his jurisdiction is one thing; a timorous reluctance to prosecute any of such individuals who have a reputation for using litigation as a defense weapon is quite another. Since Cabinet officials are mortal,

it is not likely that we shall get the precise judgmental balance desired in each of them, and it is because of these very human failings that the principles of *Spalding*, 161 U. S., at 498, dictate that absolute immunity be accorded once it be concluded by a court that a high-level executive official was "engaged in the discharge of duties imposed upon [him] by law."*

Today's opinion has shouldered a formidable task insofar as it seeks to justify the rejection of the views of the first Mr. Justice Harlan expressed in his opinion for the Court in *Spalding* v. *Vilas*, *supra*, and those of the second Mr. Justice Harlan expressed in his opinions in *Barr* v. *Matteo*, 360 U. S. 564 (1959), and its companion case of *Howard* v. *Lyons*, 360 U. S. 593 (1959). In terms of juridical jousting, if not in terms of placement in the judicial hierarchy, it has taken on at least as formidable a task when it disregards the powerful statement of Judge Learned Hand in *Gregoire* v. *Biddle*, 177 F. 2d 579 (CA2 1949).

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*The ultimate irony of today's decision is that in the area of common-law official immunity, a body of law fashioned and applied by judges, absolute immunity within the federal system is extended only to judges and prosecutors functioning in the judicial system. See *Bradley* v. *Fisher*, 13 Wall. 335 (1872); *Yaselli* v. *Goff*, 12 F. 2d 396 (CA2 1926), summarily aff'd, 275 U. S. 503 (1927). Similarly, where this Court has interpreted 42 U. S. C. § 1983 in the light of common-law doctrines of official immunity, again only judges and prosecutors are accorded absolute immunity. See *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Stump* v. *Sparkman*, 435 U. S. 349 (1978); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976). If one were to hazard an informed guess as to why such a distinction in treatment between judges and prosecutors, on the one hand, and other public officials on the other, obtains, mine would be that those who decide the common law know through personal experience the sort of pressures that might exist for such decisionmakers in the absence of absolute immunity, but may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed. But the cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as "lesser breeds without the law."

History will surely not condemn the Court for its effort to achieve a more finely ground product from the judicial mill, a product which would both retain the necessary ability of public officials to govern and yet assure redress to those who are the victims of official wrongs. But if such a system of redress for official wrongs was indeed capable of being achieved in practice, it surely would not have been rejected by this Court speaking through the first Mr. Justice Harlan in 1896, by this Court speaking through the second Mr. Justice Harlan in 1959, and by Judge Learned Hand speaking for the Court of Appeals for the Second Circuit in 1948. These judges were not inexperienced neophytes who lacked the vision or the ability to define immunity doctrine to accomplish that result had they thought it possible. Nor were they obsequious toadies in their attitude toward high-ranking officials of coordinate branches of the Federal Government. But they did see with more prescience than the Court does today, that there are inevitable trade-offs in connection with any doctrine of official liability and immunity. They forthrightly accepted the possibility that an occasional failure to redress a claim of official wrongdoing would result from the doctrine of absolute immunity which they espoused, viewing it as a lesser evil than the impairment of the ability of responsible public officials to govern.

But while I believe that history will look approvingly on the motives of the Court in reaching the result it does today, I do not believe that history will be charitable in its judgment of the all but inevitable result of the doctrine espoused by the Court in this case. That doctrine seeks to gain and hold a middle ground which, with all deference, I believe the teachings of those who were at least our equals suggest cannot long be held. That part of the Court's present opinion from which I dissent will, I fear, result in one of two evils, either one of which is markedly worse than the effect of according absolute immunity to the Secretary and the Assistant Secretary in this

case. The first of these evils would be a significant impairment of the ability of responsible public officials to carry out the duties imposed upon them by law. If that evil is to be avoided after today, it can be avoided only by a necessarily unprincipled and erratic judicial "screening" of claims such as those made in this case, an adherence to the form of the law while departing from its substance. Either one of these evils is far worse than the occasional failure to award damages caused by official wrongdoing, frankly and openly justified by the rule of *Spalding* v. *Vilas*, *Barr* v. *Matteo*, and *Gregoire* v. *Biddle*.

Syllabus

ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. *v.* BARRY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 77–240. Argued March 27, 1978—Decided June 29, 1978

Respondents, licensed physicians practicing in Rhode Island and their patients, brought a class action against petitioners, four insurance companies writing medical malpractice insurance in the State, alleging a conspiracy in violation of the Sherman Act in which three of the four companies refused to deal on any terms with the policyholders of the fourth as a means of compelling them to submit to new ground rules set by the fourth, whereby coverage on an "occurrence" basis would not be renewed and coverage would issue only on a "claims made" basis. Petitioners' motion to dismiss the antitrust claim on the ground that it was barred by the McCarran-Ferguson Act was granted by the District Court. The Court of Appeals reversed, holding that the complaint stated a claim within the "boycott" exception in § 3 (b) of that Act, which provides that the Sherman Act shall remain applicable "to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *Held:*

1. The antitrust claim is not mooted by the fact that after the complaint was filed Rhode Island formed a Joint Underwriters Association to provide medical malpractice insurance and to require all personal-injury liability insurers in the State to pool expenses and losses in providing such insurance. Since Rhode Island now permits the writing of such insurance outside of the Association, it cannot be said that "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203. Pp. 537–538.

2. The "boycott" exception of § 3 (b) applies to certain types of disputes between policyholders and insurers and is not limited to concerted activity directed against competitor insurers or agents or, more generally, against competitors of members of the boycotting group. Pp. 538–551.

(a) The language of § 3 (b) is broad and unqualified, covering "any" act or agreement amounting to a "boycott, coercion, or intimidation." Had Congress intended to limit its scope to boycotts of competitor insurer companies or agents, and to preclude all Sherman Act

protection for policyholders, it presumably would have made this explicit. The customary understanding of "boycott" at the time of enactment, as elaborated in the Sherman Act decisions of this Court, does not support a definition of the term that embraces only those combinations that target competitors of the boycotters as the ultimate objects of a concerted refusal to deal. Pp. 541–546.

(b) The legislative history, while not unambiguous, provides no substantial evidence that Congress sought to attach a special meaning to the language of § 3 (b) that would exclude policyholders from all Sherman Act protection from restrictive agreements and practices by insurers falling outside of the realm of state-supervised cooperative action. Congress intended to preserve Sherman Act review of certain forms of regulation by private combinations and groups, including but not limited to the eradication of "blacklisting" and other exclusionary devices directed at independent insurance companies or agents. Pp. 546–550.

(c) Nor does the structure of the McCarran-Ferguson Act support the proposed limitation on the reach of § 3 (b). Section 3 (b) is an exception to § 2 (b), which limits the general applicability of the federal antitrust laws "to the business of insurance to the extent that such business is not regulated by State law." Congress intended in the "boycott" clause of § 3 (b) to carve out of the overall framework of plenary state regulation an area that would remain subject to Sherman Act scrutiny. Pp. 550–551.

3. The type of private conduct alleged to have taken place here, directed against policyholders, constitutes a "boycott" within the meaning of § 3 (b). Pp. 552–555.

(a) Such conduct accords with the common understanding of a boycott. The agreement binding petitioners erected a barrier between respondents and any alternative source of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. Pp. 552–553.

(b) The conduct with which petitioners are charged appears to have occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island. This is not a case where a State has decided that regulatory policy requires that certain risks be allocated in a particular fashion among insurers or has authorized insurers to decline to insure particular risks. Here a group of insurers decided to resolve by private action the problem of escalating damages claims and verdicts by coercing policyholders of one of the insurers to accept a severe limitation of coverage. Pp. 553–555.

555 F. 2d 3, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 555.

Sidney S. Rosdeitcher argued the cause for petitioners. With him on the briefs were *Howard S. Veisz, Thomas D. Gidley, Stephen J. Carlotti, Charles Lister, Joseph A. Kelly, Walker B. Comegys, Kirk Hanson,* and *Joseph V. Cavanagh.*

Leonard Decof argued the cause and filed a brief for respondents.

Deputy Solicitor General Friedman argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Assistant Attorney General Shenefield, Richard A. Allen,* and *John J. Powers III.**

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondents, licensed physicians practicing in the State of Rhode Island and their patients, brought a class action, in part under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq.* (1976 ed.), against petitioners, the four insurance companies writing medical malpractice insurance in the State. The complaint alleged a private conspiracy of the four companies in which three refused to sell respondents insurance of any type as a means of compelling their submission to new ground rules of coverage set by the fourth. Petitioner insurers successfully moved in District Court to dismiss the antitrust claim on the ground that it was barred by the McCarran-Ferguson Act (Act), 59 Stat. 33, as amended, 15 U. S. C.

*Briefs of *amici curiae* urging reversal were filed by *Richard A. Whiting* and *Loren Kieve* for the American Insurance Assn. et al.; and by *Jon S. Hanson* for the National Association of Insurance Commissioners.

Roger Tilbury and *Henry Kane* filed a brief for the Portland Retail Druggists Assn., Inc., as *amicus curiae* urging affirmance.

Eugene Greener, Jr., filed a brief for Lakeside Hospital, Inc., as *amicus curiae*.

§§ 1011–1015 (1976 ed.).[1] The Court of Appeals reversed, holding that respondents' complaint stated a claim within the "boycott" exception in § 3 (b) of the Act, which provides that the Sherman Act shall remain applicable "to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation," 15 U. S. C. § 1013 (b) (1976 ed.). 555 F. 2d 3 (CA1 1977). We are required to decide whether the "boycott" exception applies to disputes between policyholders and insurers.

I

As this case comes to us from the reversal of a successful motion to dismiss, we treat the factual allegations of respondents' amended complaint as true.[2] During the period in

[1] The McCarran-Ferguson Act provides in relevant part:

"Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

. . . . . .

"Sec. 3 (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 59 Stat. 34, as amended, 61 Stat. 448, 15 U. S. C. §§ 1012, 1013 (b) (1976 ed.).

[2] Both the amended complaint and a second amended complaint, filed after the District Court's dismissal of the antitrust claim, also alleged several state-law claims. Review of the disposition of those claims has not been sought in this Court.

To the extent the complaint alleges a violation of the Clayton Act, 38 Stat. 730, as amended, 15 U. S. C. § 12 *et seq.* (1976 ed.), that claim is barred by respondents' concession that the requirements of § 2 (b) of the McCarran-Ferguson Act are satisfied in this case. See n. 9, *infra*.

question, petitioners St. Paul Fire & Marine Insurance Co. (St. Paul), Aetna Casualty & Surety Co., Travelers Indemnity of Rhode Island (and two affiliated companies), and Hartford Casualty Co. (and an affiliated company) were the only sellers of medical malpractice insurance in Rhode Island. In April 1975, St. Paul, the largest of the insurers, announced that it would not renew medical malpractice coverage on an "occurrence" basis, but would write insurance only on a "claims made" basis.[3] Following St. Paul's announcement, and in furtherance of the alleged conspiracy, the other petitioners refused to accept applications for any type of insurance from physicians, hospitals, or other medical personnel whom St. Paul then insured. The object of the conspiracy was to restrict St. Paul's policyholders to "claims made" coverage by compelling them to "purchase medical malpractice insurance from one insurer only, to wit defendant, St. Paul, and that [such] purchase must be made on terms dictated by the defendant, St. Paul." App. 25. It is alleged that this scheme was effectuated by a collective refusal to deal, by unfair rate discrimination, by agreements not to compete, and by horizontal price fixing, and that petitioners engaged in "a purposeful course of coercion, intimidation, boycott and unfair competition with respect to the sale of medical malpractice insurance in the State of Rhode Island." *Id.*, at 24–27.[4]

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[3] An "occurrence" policy protects the policyholder from liability for any act done while the policy is in effect, whereas a "claims made" policy protects the holder only against claims made during the life of the policy. The Court of Appeals noted that "a doctor who practiced for only one year, say 1972, would need only one 1972 'occurrence' policy to be fully covered, but he would need several years of 'claims made' policies to protect himself from claims arising out of his acts in 1972." 555 F. 2d 3, 5 n. 1 (CA1 1977).

[4] Respondents further assert that "it is virtually impossible for a physician, hospital or other medical personnel to engage in the practice of medicine or provide medical services or treatment without medical malpractice insurance," App. 22, and that as a result of petitioners' conspiracy,

On November 19, 1975, the District Court for the District of Rhode Island granted petitioners' motion to dismiss. The District Court declined to give the "boycott" exception the reading suggested by its "broad wording," declaring instead that "the purpose of the boycott, coercion, and intimidation exception was solely to protect insurance agents or other insurance companies from being 'black-listed' by powerful combinations of insurance companies, not to affect the insurer-insured relationship." *Id.*, at 44.

On May 16, 1977, a divided panel of the Court of Appeals for the First Circuit reversed in pertinent part. The majority reasoned that the "boycott" exception was broadly framed, and that there was no reason to decline to give the term "boycott" its "normal Sherman Act scope." 555 F. 2d, at 8. "In antitrust law, a boycott is a 'concerted refusal to deal' with a disfavored purchaser or seller." *Id.*, at 7. The court thought that this reading would not undermine state regulation of the industry. "Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity." *Id.*, at 9.

On August 12, 1977, petitioners sought a writ of certiorari in this Court. To resolve the conflicting interpretations of § 3 (b) adopted by several Courts of Appeals,[5] we granted the writ on October 31, 1977. 434 U. S. 919. We now affirm.

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they "may be forced to withhold medical services and disengage from the practice of medicine, except on an emergency basis," *id.*, at 26.

[5] Following the rendition of the legislative history in *Transnational Ins. Co.* v. *Rosenlund*, 261 F. Supp. 12 (Ore. 1966), two Circuits squarely have held that § 3 (b) reaches only "blacklists" of insurance companies or agents by other insurance companies or agents. See *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F. 2d 732, 734 (CA5 1975); but cf. *Battle* v. *Liberty National Life Ins. Co.*, 493 F. 2d 39, 51 (CA5 1974), cert. denied, 419 U. S. 1110 (1975); *Addrissi* v. *Equitable Life Assurance Soc.*, 503 F. 2d 725, 729 (CA9 1974), cert. denied, 420 U. S. 929 (1975).

Two other Circuits have adopted a broader reading of § 3 (b). See *Ballard* v. *Blue Shield of Southern W. Va., Inc.*, 543 F. 2d 1075, 1078 (CA4 1976), cert. denied, 430 U. S. 922 (1977) (alleged conspiracy

II

At the threshold, we confront a question of mootness. Although not raised by the parties, this issue implicates our jurisdiction. See, *e. g., Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 7–8 (1978); *Sosna* v. *Iowa*, 419 U. S. 393, 398 (1975).

The Court of Appeals requested the parties to brief the question whether the antitrust claim was mooted by Rhode Island's formation, after the initial complaint was filed, of a Joint Underwriting Association (JUA) to provide malpractice insurance to all licensed providers of health-care services and to require the participation of all personal-injury liability insurers in the State in a scheme to pool expenses and losses in providing such insurance.[6] The court noted that while the State's action prevented St. Paul from "gather[ing] the fruits of the alleged conspiracy," it was "convinced that, for purposes of [its] jurisdiction, the state's act did not extinguish plaintiffs' every claim for relief." 555 F. 2d, at 5–6, n. 2. We agree.

Although later developments may have "reduce[d] the

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between insurers and physicians to deny health insurance coverage for chiropractic services); *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 182 U. S. App. D. C. 264, 276–277, 561 F. 2d 262, 274–275 (1977), cert. pending, No. 77–580 (alleged conspiracy between insurers and automobile repair shops to boycott noncooperative repair shops). See also *Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.*, 326 F. 2d 841, 846 (CA2 1963) (dictum), cert. denied, 376 U. S. 952 (1964).

[6] To establish a stable market for medical malpractice insurance, the JUA was created on a temporary basis by Emergency Regulation XXI, R. I. Dept. of Business Regulation, Insurance Div., June 16, 1975, App. 114–127, and received legislative sanction in R. I. Gen. Laws § 42–14.1–1 (1977). The emergency regulation was revised in April 1976 to permit the writing of medical malpractice insurance outside the JUA for all providers of health-care services other than physicians. App. 150–151. A subsequent change in state law authorizes the Director to promulgate regulations permitting the selling of such insurance outside of the JUA to physicians as well. 1976 R. I. Pub. Laws, ch. 79, § 1.

practical importance of this case" for the parties, it cannot be said that "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); see *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953). Since Rhode Island now permits the writing of medical malpractice insurance outside of the JUA, see n. 6, *supra*, we cannot assume that petitioners will not re-enter the market in some fashion. The conditions that gave rise to the controversy have not been shown to have abated. And the possibility of a resurgence of the alleged conspiracy is further evidenced by petitioners' acknowledgment in the Court of Appeals "that the alleged antitrust violations could recur in the future." 2 Record 83.[7]

III

The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Prior to that decision, it had been assumed, in light of *Paul* v. *Virginia*, 8 Wall. 168, 183

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[7] Although this case is technically not moot, the parties are not barred from showing, "on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); see *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633–636 (1953).

We have not addressed respondents' claim for damages arising out of their inability "to obtain medical malpractice insurance on a reasonable basis after June 30, 1975," App. 26. Such a claim might itself preclude a finding of mootness, see *e. g.*, *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8–9 (1978), but the parties have not advised the Court whether this claim survives the formation of the JUA. The Court of Appeals stated that respondents were "entitled to seek both injunctive relief and treble damages," noting, in a separate discussion, that "the change in malpractice coverage has increased costs for the doctors." 555 F. 2d, at 12, and n. 7. The validity of the damages claim, in light of the role of the JUA and the considerations identified in this decision, is a matter for initial determination by the courts below.

(1869), that the issuance of an insurance policy was not a transaction in interstate commerce and that the States enjoyed a virtually exclusive domain over the insurance industry. *South-Eastern Underwriters* held that a fire insurance company which conducted a substantial part of its transactions across state lines is engaged in interstate commerce, and that Congress did not intend to exempt the business of insurance from the operation of the Sherman Act.[8] The decision provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry. Congress moved quickly, enacting the McCarran-Ferguson Act within a year of the decision in *South-Eastern Underwriters.*

As this Court observed shortly afterward, "[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 429 (1946). Our decisions have given effect to this purpose in construing the operative terms of the § 2 (b) proviso, which is the critical provision limiting the general applicability of the federal antitrust laws "to the business of insurance to the extent that such business is not regulated by State Law." See *SEC* v. *National Securities, Inc.,* 393 U. S. 453, 460 (1969); *FTC* v. *National Casualty Co.,* 357 U. S.

[8] The Government in that case brought a Sherman Act prosecution against the South-Eastern Underwriters Association (SEUA), its membership of nearly 200 private stock fire insurance companies, and 27 individuals. The indictment alleged conspiracies to maintain arbitrary and noncompetitive premium rates on fire and "allied lines" of insurance in several States, and to monopolize trade and commerce in the same lines of insurance. It was asserted that the conspirators not only fixed rates but also, in the Court's words, "employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [SEUA] members on [SEUA] terms." *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S., at 535.

560 (1958); *infra*, at 550–551. Section 2 (b) is not in issue in this case.[9] Rather, we are called upon to interpret, for the first time, the scope of § 3 (b), the principal exception to this scheme of pre-emptive state regulation of the "business of insurance."

The Court of Appeals in this case determined that the word "boycott" in § 3 (b) should be given its ordinary Sherman Act meaning as "a concerted refusal to deal." The "boycott" exception, so read, covered the alleged conspiracy of petitioners, conducted "outside any state-permitted structure or procedure, [to] agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies." 555 F. 2d, at 9.

Petitioners take strong exception to this reading, arguing that the "boycott" exception "should be limited to cases where concerted refusals to deal are used to exclude or penalize insurance companies or other traders which refuse to conform their competitive practices to terms dictated by the conspiracy." Brief for Petitioners 13. This definition is said to accord with the plain meaning and judicial interpretations of the term "boycott," with the evidence of specific legislative intent, and with the overall structure of the Act. Respondents counter that the language of § 3 (b) is sweeping, and that there is no warrant for the view that the exception protects insurance companies "or other traders" from anticompetitive practices, but withholds similar protection from policyholders victimized by private, predatory agreements. They urge that this case involves a "traditional boycott," defined as a concerted refusal to deal on any terms, as opposed to a refusal to deal except on specified terms. Brief for Respondents 43.

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[9] Respondents did not contest below "that [petitioners'] acts were related to the business of insurance and that Rhode Island effectively regulates that business." 555 F. 2d, at 6. They do not argue to the contrary in this Court.

We consider first petitioners' definition of "boycott" in view of the language, legislative history, and structure of the Act.[10]

IV

A

The starting point in any case involving construction of a statute is the language itself. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). With economy of expression, Congress provided in § 3 (b) for the continued applicability of the Sherman Act to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Congress thus employed terminology that evokes a tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act. It may be assumed, in the absence of indications to the contrary, that Congress intended this language to be read in light of that tradition.

The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.[11] The word gained currency in this country largely as a term of opprobrium to describe certain tactics employed by parties to labor disputes. See, *e. g.*, *State* v. *Glidden*, 55 Conn. 46, 8 A. 890 (1887); Laidler, Boycott, in 2 Encyclopaedia of the Social Sciences 662–666 (1930). Thus it is not surprising that the term first entered the lexicon of antitrust law in decisions involving attempts by labor unions to encourage third parties

[10] The Court of Appeals' ruling rested on the determination that respondents charged petitioners "with an unlawful boycott," *id.*, at 12. In light of our disposition of this case, we do not decide the scope of the terms "coercion" and "intimidation" in § 3 (b).

[11] See Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal, 1970 Duke L. J. 247, 248; Webster's New International Dictionary of the English Language 321 (2d ed. 1949); 1 The Oxford English Dictionary 1040 (1933); Black's Law Dictionary 234 (4th ed. 1968).

to cease or suspend doing business with employers unwilling to permit unionization.[12] See, *e. g.*, *Loewe* v. *Lawlor*, 208 U. S. 274 (1908); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911); *Lawlor* v. *Loewe*, 235 U. S. 522 (1915); *Duplex Co.* v. *Deering*, 254 U. S. 443 (1921); *Bedford Stone Co.* v. *Stone Cutters' Assn.*, 274 U. S. 37 (1927).[13]

Petitioners define "boycott" as embracing only those combinations which target *competitors* of the boycotters as the ultimate objects of a concerted refusal to deal. They cite commentary that attempts to develop a test for distinguishing the types of restraints that warrant *per se* invalidation from other concerted refusals to deal that are not inherently destructive of competition.[14] But the issue before us is whether the conduct in question involves a boycott, not whether it is *per se* unreasonable. In this regard, we have not been re-

[12] The first decision of this Court dealing with a boycott situation, although without using the term, appears to be *Montague & Co.* v. *Lowry*, 193 U. S. 38 (1904), a nonlabor case involving an association of wholesalers and manufacturers that provided in its bylaws that no dealer member could buy from any manufacturer who was not a member of the association or sell for less than list price to a nonmember. See Kirkpatrick, Commercial Boycotts as Per Se Violations of the Sherman Act, 10 Geo. Wash. L. Rev. 302, 306–307 (1942).

[13] The cases cited in the text are significant for their general interpretation of the Sherman Act even though they are no longer controlling as to the applicability of the antitrust laws to the activities of labor unions. See *Connell Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616, 621–623 (1975); *United States* v. *Hutcheson*, 312 U. S. 219, 234 (1941); *Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, 102–103 (1940).

[14] See L. Sullivan, Handbook of the Law of Antitrust 256–259 (1977). Other commentators have framed a somewhat broader definition for a *per se* offense in this area. See Barber, Refusals to Deal under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 875 (1955) ("group action to coerce third parties to conform to the pattern of conduct desired by the group or to secure their removal from competition"); Kirkpatrick, *supra* n. 12, at 305 ("interference with the relations between a nonmember of the combination and its members or others"). We express no opinion, however, as to the merit of any of these definitions.

ferred to any decision of this Court holding that petitioners' test states the necessary elements of a boycott within the purview of the Sherman Act. Indeed, the decisions reflect a marked lack of uniformity in defining the term.

Petitioners refer to cases stating that "group boycotts" are "concerted refusals by traders to deal with other traders," *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, 212 (1959), or are combinations of businessmen "to deprive others of access to merchandise which the latter wish to sell to the public," *United States* v. *General Motors Corp.*, 384 U. S. 127, 146 (1966). We note that neither standard in terms excludes respondents—for whom medical malpractice insurance is necessary to ply their "trade" of providing health-care services, see n. 4, *supra*—from the class of cognizable victims. But other verbal formulas also have been used. In *FMC* v. *Svenska Amerika Linien*, 390 U. S. 238, 250 (1968), for example, the Court noted that "[u]nder the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*." The Court also has stated broadly that "group boycotts, or concerted refusals to deal, clearly run afoul of § 1 [of the Sherman Act]." *Times-Picayune* v. *United States*, 345 U. S. 594, 625 (1953). Hence, "boycotts are not a unitary phenomenon." P. Areeda, Antitrust Analysis 381 (2d ed. 1974).

As the labor-boycott cases illustrate, the boycotters and the ultimate target need not be in a competitive relationship with each other. This Court also has held unlawful, concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers. See, *e. g.*, *Paramount Famous Corp.* v. *United States*, 282 U. S. 30 (1930); *United States* v. *First Nat. Pictures, Inc.*, 282 U. S. 44 (1930); *Binderup* v. *Pathe Exchange*, 263 U. S. 291 (1923). See also *Anderson* v. *Shipowners Assn.*, 272 U. S. 359 (1926). As the

Court put it in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214 (1951), "the Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers." [15]

Whatever other characterizations are possible,[16] petitioners' conduct fairly may be viewed as "an organized boycott," *Fashion Guild* v. *FTC*, 312 U. S. 457, 465 (1941), of St. Paul's policyholders. Solely for the purpose of forcing physicians and hospitals to accede to a substantial curtailment of the coverage previously available, St. Paul induced its competitors to refuse to deal on any terms with its customers. This agreement did not simply fix rates or terms of coverage; it effectively barred St. Paul's policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market. The pact served as a tactical weapon invoked by St. Paul in support of a dispute with its policyholders. The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been

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[15] *Kiefer-Stewart Co.* involved a horizontal resale price maintenance scheme, see *White Motor Co.* v. *United States*, 372 U. S. 253, 260 (1963), but it has been cited as a "group boycott" case, see *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, 212 n. 5 (1959); *Times-Picayune* v. *United States*, 345 U. S. 594, 625 (1953). See also *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 295–296 (1945) (alleged conspiracy of producers, wholesalers, and retailers to maintain local retail prices by means of a "boycott program").

See generally Report of the U. S. Attorney General's National Committee to Study the Antitrust Laws 137 (1955) ("approv[ing] the established legal doctrines which condemn group boycotts of customers or suppliers as routine unreasonable restraints forbidden by Section 1 of the Sherman Act").

[16] Petitioners suggest that the alleged conspiracy in this case presents a horizontal agreement not to compete, as distinguished from a boycott. See *United States* v. *Topco Associates*, 405 U. S. 596, 612 (1972); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 573–575 (CA2 1961).

viewed as conduct supporting a finding of unlawful boycott. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600, 612–613 (1914), citing *Loewe* v. *Lawlor, supra;* see *Klor's* v. *Broadway-Hale Stores, supra,* at 213; *Anderson* v. *Shipowners Assn., supra,* at 362–363, 364–365. As in *Binderup* v. *Pathe Exchange, supra,* at 312, where film distributors had conspired to cease dealing with an exhibitor because he had declined to purchase films from some of the distributors, "[t]he illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the [target]." [17]

Thus if the statutory language is read in light of the customary understanding of "boycott" at the time of enactment, respondents' complaint states a claim under § 3 (b).[18] But, as Mr. Justice Cardozo observed, words or phrases in a statute come "freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a teacher that is not

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[17] As one commentator has noted: "If an individual competitor lacks the bargaining power to get a particular contract term, the courts apparently will not let him join with other competitors and use their collective bargaining power to compel the insertion of such a term in the contract, no matter how desirable." Bird, *supra* n. 11, at 263, discussing, *inter alia, Binderup* v. *Pathe Exchange; Paramount Famous Corp.* v. *United States,* 282 U. S. 30 (1930).

[18] We note our disagreement with Mr. Justice Stewart's expression of alarm that a reading of the operative terms of § 3 (b), consistent with traditional Sherman Act usage, "would plainly devour the broad antitrust immunity bestowed by § 2 (b)." *Post,* at 559. Whatever the precise reach of the terms "boycott," "coercion," and "intimidation," the decisions of this Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act. See, *e. g., Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600, 611 (1914), quoting *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 438 (1911). In this regard, we are not cited to any decision illustrating the assertion, *post,* at 559 n. 6, that price fixing, in the absence of any additional enforcement activity, has been treated either as "a boycott" or "coercion."

to be ignored." *Duparquet Co.* v. *Evans*, 297 U. S. 216, 221 (1936) (citation omitted). We therefore must consider whether Congress intended to attach a special meaning to the word "boycott" in § 3 (b).

B

In the Court of Appeals, petitioners argued that only insurance companies and agents could be victims of practices within the reach of the "boycott" exception.[19] That position enjoys some support in the legislative history because the principal targets of the practices termed "boycotts" and "other types of coercion and intimidation" in *South-Eastern Underwriters* were insurance companies that did not belong to the industry association charged with the conspiracy, as well as agents and customers who dealt with those nonmembers. See 322 U. S., at 535–536. Moreover, there are references in the debates to the need for preventing insurance companies and agents from "blacklisting" and imposing other sanctions against uncooperative competitors or agents. See 91 Cong. Rec. 1087 (1945) (remarks of Rep. Celler); *id.*, at 1485–1486 (remarks of Sen. O'Mahoney). In this Court, however, petitioners expanded the list of potential targets of § 3 (b) conduct to include any victim—even one outside the insurance industry—who is in a competitive relationship with any of the members of the boycotting group. Tr. of Oral Arg. 22, 57–58.

The principal exception in the McCarran-Ferguson bill to the pre-emptive role of state regulation was for acts or agreements amounting to a "boycott, coercion, or intimidation" violative of the Sherman Act. Both Committee Reports stated: "[A]t no time are the prohibitions in the Sherman Act against any agreement or act of boycott, coercion, or in-

[19] Brief for Appellees Aetna Casualty & Surety Co. et al. in No. 76–1226, p. 18 (CA1); Brief for Appellees St. Paul et al. in No. 76–1226, p. 14 (CA1).

timidation suspended. These provisions of the Sherman Act remain in full force and effect." S. Rep. No. 20, 79th Cong., 1st Sess., 3 (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945). The debates make clear that the "boycott" exception was viewed by the Act's proponents as an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action.

The bill ultimately enacted emerged from Conference Committee as a compromise between conflicting Senate and House proposals.[20] Although the conference substitute quickly gained approval in the House, it encountered opposition in the Senate. Senator Pepper spoke at length against privileging the States "[to enact] some mild form of legislation which they may call regulatory, thereby defeating the purpose of the Supreme Court decision and defeating the act itself." 91 Cong. Rec. 1443 (1945). The responses of Senators Ferguson and O'Mahoney, floor managers of the conference bill, indicate

[20] The bill introduced by Senators McCarran and Ferguson (S. 340) provided that only federal legislation specifically dealing with insurance could override state laws relating to the regulation or taxation of that business, and created a moratorium period, staying the operation of the Sherman and Clayton Acts to enable the States to adjust their statutes to *South-Eastern Underwriters*. S. Rep. No. 20, 79th Cong., 1st Sess. (1945); 91 Cong. Rec. 478 (1945). Largely at the insistence of Senator O'Mahoney, it was amended on the floor of the Senate to provide that the Sherman and Clayton Acts would not be pre-empted at the expiration of the moratorium. *Id.*, at 488. The bill introduced in the House and reported favorably out of committee contained provisions that were similar to the original bill in the Senate. H. R. Rep. No. 143, 79th Cong., 1st Sess., 1 (1945); 91 Cong. Rec. 1085 (1945). The bill as reported passed the House. A Conference Committee then was appointed, composed of Senators McCarran, O'Mahoney, and Ferguson, and Representatives Sumners, Walter, and Hancock. In place of the Senate floor amendment, the conference substitute added the proviso to § 2 (b) that is presently in the Act. H. R. Conf. Rep. No. 213, 79th Cong., 1st Sess., 1–2 (1945).

that while Congress was willing to permit the States to substitute regulation for competition with respect to matters such as rates and terms of coverage, the "boycott" clause defined a range of conduct that would remain within the purview of the Sherman Act.[21]

Petitioners cite passages of the debates in which Senator O'Mahoney refers to "blacklisting" and other exclusionary devices directed at independent insurance companies or agents. But those passages also provide support for respondents' position that the eradication of such practices was not the only objective of Congress in enacting § 3 (b). In Senator O'Mahoney's view, "[t]he vice in the insurance industry . . . was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." 91 Cong. Rec. 1485 (1945). The conference substitute, he insisted, "outlaws completely all steps by which small groups have attempted to establish themselves in control in the great interstate and international business of insurance." *Ibid.* Perhaps the most revealing discussion is found in his explanation of why the language of § 3 (b) was limited to "boycotts,

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[21] Senator Ferguson perceived a distinction between legislation authorizing "rating bureaus," which would not be disturbed by the bill, 91 Cong. Rec. 1481 (1945), and legislation permitting insurance companies to engage in practices constituting a "boycott, coercion, or intimidation," which would remain subject to the Sherman Act, *ibid.*

Senator O'Mahoney noted that the conference substitute would permit "certain agreements which can normally be made in the insurance business which are in the public interest, but which might conceivably be a violation of the antitrust law," such as a "rating bureau" operating "under the supervision and regulation of the State . . . ." *Id.*, at 1444. But other practices constituting "regulation by private combinations and groups," *id.*, at 1483, would have to pass muster under the Sherman Act.

coercion, or intimidation," and did not reach all combinations among insurance companies and their agents. He stated:

> "[T]he committee was cognizant of the fact that many salutary combinations might be proposed and which ought to be approved, to which there was no objection. From the very beginning, Mr. President, of this controversy over insurance I have always taken the position that I saw no objection to combinations or agreements among the companies in the public interest *provided those combinations and agreements were in the open and approved by law. Public supervision of agreements is essential.*
>
> . . . . .
>
> "[M]y judgment is that *every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge* in this whole industry study *would be prohibited by* [*§ 3 (b)*]." 91 Cong. Rec. 1486 (1945) (emphasis supplied).

The rules and regulations of private associations in the industry, while providing Senator O'Mahoney with a vivid example of "the sort of agreement which ought to be condemned," *ibid.*, exemplified a larger evil—"regulation by private combinations and groups," *id.*, at 1483—that required the continued application of the Sherman Act.[22]

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[22] The dissenting opinion of MR. JUSTICE STEWART advances the view, abandoned by petitioners in this Court, see *supra*, at 546, that § 3 (b) applies only "to the kinds of antitrust violations alleged in *South-Eastern Underwriters* . . . ." *Post*, at 565. The dissent refers to no statement, either in the Committee Reports or the debates, asserting that § 3 (b)'s only purpose was to keep alive the *South-Eastern Underwriters* indictment or purporting to restrict its scope to the practices specifically alleged therein. There is nothing in the proposal of the National Association of Insurance Commissioners, identified by the dissent as the model for the Senate bill, S. 340, that evinces such a limited purpose. The report accompanying the proposal stated in pertinent part:

"No exemption is sought nor expected for oppressive or destructive practices. On the whole, insurance has been conducted on a high plane,

The language of § 3 (b) is broad and unqualified; it covers "any" act or agreement amounting to a "boycott, coercion, or intimidation." If Congress had intended to limit its scope to boycotts of competing insurance companies or agents, and to preclude all Sherman Act protection for policyholders, it is not unreasonable to assume that it would have made this explicit. While the legislative history does not point unambiguously to the answer, it provides no substantial support for limiting language that Congress itself chose not to limit.[23]

C

Petitioners also contend that the structure of the Act supports their reading of § 3 (b). They note that this Court

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with great benefit to the public, *and if inconsistent procedures are found they must be eradicated.* Provision is made that the Sherman Act shall not now *or hereafter* be inapplicable to any act of boycott, coercion, or intimidation." 90 Cong. Rec. A4406 (1944) (emphasis supplied).

It is difficult to view this language as supporting the dissent's interpretation.

It also is asserted that the "boycott" clause in the Senate bill was intended to apply only during the moratorium period, a fact which supposedly supports the dissent's narrow reading of the clause. But the dissent concedes that "[w]hatever its initial impetus . . . , there is no indication that the provision was finally thought to be applicable only to the *South-Eastern* litigation." *Post,* at 563–564, n. 20. Moreover, neither the Committee Reports, see *supra,* at 546–547, nor the insurance commissioners' statement, quoted above, suggests an intent to suspend the operation of the "boycott" clause at any time. Certainly Senator Ferguson disclaimed such an intent, stating he saw "no reason for not changing the word 'section' to 'act,' because I am of the opinion that that was the intention of all concerned." 91 Cong. Rec. 479 (1945). There simply is no persuasive evidence of an original design merely to preserve the *South-Eastern Underwriters* indictment.

[23] The legislative materials do not demonstrate with necessary clarity "that [Congress] has in fact used a private code, so that what appears to be violence to language is merely respect to special usage." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 543–544 (1947).

has interpreted the term "business of insurance" in § 2 (b) broadly to encompass "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement," *SEC* v. *National Securities, Inc.*, 393 U. S., at 460, and has held that the mere enactment of "prohibitory legislation" and provision for "a scheme of administrative supervision" constitute adequate regulation to satisfy the proviso to § 2 (b), *FTC* v. *National Casualty Co.*, 357 U. S., at 564–565. Thus, petitioners conclude, § 3 (b) cannot be interpreted in a fashion that would undermine the congressional judgment expressed in § 2 (b) that the protection of policyholders is the primary responsibility of the States and that the state regulation which precludes application of federal law is not limited to regulation specifically authorizing the conduct challenged.

Petitioners rely on a syllogism that is faulty in its premise, for it ignores the fact that § 3 (b) is an exception to § 2 (b), and that Congress intended in the "boycott" clause to carve out of the overall framework of plenary state regulation an area that would remain subject to Sherman Act scrutiny. The structure of the Act embraces this exception. Unless § 3 (b) is read to limit somewhat the sweep of § 2 (b), it serves no purpose whatever. Petitioners do not press their argument that far, but they suggest no persuasive reason for engrafting a particular limitation on § 3 (b) that is justified neither by its language nor by the legislative history.[24]

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[24] Even under petitioners' reading, certain cooperative arrangements among insurance companies may constitute a "boycott" under § 3 (b) notwithstanding the applicability of § 2 (b) to activities that "relate . . . closely to their status as reliable insurers," *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 460 (1969), and the adequacy of state regulation of the industry. Hence, petitioners' line may not be as "bright" as they suggest.

The dissenting opinion of MR. JUSTICE STEWART also argues that the structure of the Act supports a restrictive reading of § 3 (b). We do not think the dissent's restatement of the holding in *FTC* v. *National Casualty Co.*, 357 U. S. 560, 564 (1958), see *post*, at 557–558, n. 4, furthers resolution

V

We hold that the term "boycott" is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group. It remains to consider whether the type of private conduct alleged to have taken place in this case, directed against policyholders, constitutes a "boycott" within the meaning of § 3 (b).

A

The conduct in question accords with the common understanding of a boycott. The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, to refuse to sell any insurance to its policyholders. "A valuable service germane to [respondents'] business and important to their effective competition with others was withheld from them by

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of the problem at hand. It is not disputed that Congress intended that certain forms of "regulation by private combinations and groups," 91 Cong. Rec. 1483 (1945) (remarks of Sen. O'Mahoney), remain subject to Sherman Act scrutiny, notwithstanding enactment of the type of "prohibitory legislation," coupled with "enforcement through a scheme of administrative supervision," that was deemed sufficient for § 2 (b) purposes in *National Casualty Co.* In that case the Court rejected the Federal Trade Commission's argument that "where a statute, instead of sanctioning a particular type of transaction, prohibits conduct in general terms and provides for enforcement through administrative action, there is realistically, in the absence of such enforcement, no 'regulation' in fact." Brief for Federal Trade Commission, O. T. 1957, Nos. 435 and 436, p. 53. The question that nonetheless remains is whether Congress intended to foreclose *all* Sherman Act protection for policyholders victimized by private conspiracies of insurers when a State has engaged in generally comprehensive regulation under § 2 (b). We think the record does not support such a foreclosure.

collective action." *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 348–349, n. 5 (1963).

The agreement binding petitioners erected a barrier between St. Paul's customers and any alternative source of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. This concerted refusal to deal went well beyond a private agreement to fix rates and terms of coverage, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service. Cf. *Continental T. V., Inc.* v. *GTE Sylvania Inc.,* 433 U. S. 36, 55 (1977). St. Paul's policyholders became the captives of their insurer. In a sense the agreement imposed an even greater restraint on competitive forces than a horizontal pact not to compete with respect to price, coverage, claims policy, and service, since the refusal to deal in any fashion reduced the likelihood that a competitor might have broken ranks as to one or more of the fixed terms.[25] The conduct alleged here is certainly not, in Senator O'Mahoney's terms, within the category of "agreements which can normally be made in the insurance business," 91 Cong. Rec. 1444 (1945), or "agreements and combinations in the public interests [*sic*] which can safely be permitted," *id.,* at 1486.

B

We emphasize that the conduct with which petitioners are charged appears to have occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island. There was no state authorization of the conduct in question. This was the explicit premise of the Court of

[25] "[E]ven where prices are rigidly fixed, the members of a cartel will be able to compete with each other with respect to product quality unless a homogeneous product is involved. Indeed, even if the product is homogeneous there will be room for rivalry in such matters as promptness in filling orders and the provision of ancillary services. An effective division of markets, by contrast, might substantially wash out all opportunity for rivalry." Sullivan, *supra* n. 14, at 224–225.

Appeals' decision, see 555 F. 2d, at 9, and petitioners do not aver that state law or regulatory policy can be said to have required or authorized the concerted refusal to deal with St. Paul's customers.[26]

Here the complaint alleges an attempt at "regulation by private combinations and groups," 91 Cong. Rec. 1483 (1945) (remarks of Sen. O'Mahoney). This is not a case where a State has decided that regulatory policy requires that certain categories of risks be allocated in a particular fashion among insurers, or where a State authorizes insurers to decline to insure particular risks because the continued provision of that insurance would undermine certain regulatory goals, such as the maintenance of insurer solvency. In this case, a group of insurers decided to resolve by private action the problem of escalating damages claims and verdicts by coercing the policyholders of St. Paul to accept a severe limitation of coverage essential to the provision of medical services. See n. 4, *supra*. We conclude that this conduct, as alleged in the complaint, constitutes a "boycott" under § 3 (b).[27]

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[26] Counsel for petitioners stated at oral argument that he was not sure whether St. Paul had filed the specific policy change in issue with the director of the state insurance division. Tr. of Oral Arg. 8. Even if we assume that such a filing had been made, there is no suggestion that the State, in furtherance of its regulatory policies, authorized the concerted refusal to deal on any terms with St. Paul's policyholders.

Although the dissenting opinion below noted "that Rhode Island has exercised its right to regulate all material aspects of the business of insurance and that the actions complained of relative to withholding malpractice insurance were all part of such regulated business," 555 F. 2d, at 14, this statement refers to the requirements of the proviso to § 2 (b). The dissent did not argue that the agreement in question was within the contemplation of any state regulatory scheme.

[27] We have no occasion here to decide whether the element of state regulatory direction or authorization of the particular practice, absent in this case, is a factor to be considered in the definition of "boycott" within the meaning of § 3 (b), or whether it comes into play as part of a possible

Our ruling does not alter § 2 (b)'s protection of state regulatory and tax laws, its recognition of the primacy of state regulation, or the limited applicability of the federal antitrust laws generally "to the extent that" the "business of insurance" is not regulated by state law. Moreover, conduct by individual actors falling short of concerted activity is simply not a "boycott" within § 3 (b). Cf. *Times-Picayune* v. *United States,* 345 U. S., at 625. Finally, while we give force to the congressional intent to preserve Sherman Act review for certain types of private collaborative activity by insurance companies, we do not hold that all concerted activity violative of the Sherman Act comes within § 3 (b). Nor does our decision address insurance practices that are compelled or specifically authorized by state regulatory policy.

The judgment of the Court of Appeals therefore is

Affirmed.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Section 2 (b) of the McCarran-Ferguson Act provides that the Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." [1] Section 3 (b) limits the antitrust immunity

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defense under the "state action" doctrine, as elaborated in *Parker* v. *Brown,* 317 U. S. 341 (1943), and its progeny.

[1] Section 2 provides in full:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal

which the States may confer by providing that the Sherman Act shall remain applicable to agreements or acts of "boycott, coercion, or intimidation." [2] Today the Court holds that the term "boycott" found in § 3 (b) should be given the same broad meaning that it has been given in Sherman Act case law. It seems clear to me, however, that the "boycott, coercion, or intimidation" language of § 3 (b) was intended to refer, not to the practices defined and condemned by the Sherman Act, but to the narrower range of practices involved in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, the case that prompted Congress to enact the McCarran-Ferguson Act.

I

The Court accurately reads the Act as not conferring broad-scale antitrust immunity on the insurance industry, at least not for practices that "occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island." *Ante*, at 553. Although Congress plainly intended to give the States priority in regulating the insurance industry, it just as plainly intended not to immunize that industry from federal antitrust liability "to the extent that such business is not regulated by State Law." [3] In thus construing the Act's

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Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." 59 Stat. 34, as amended, 61 Stat. 448, 15 U. S. C. § 1012 (1976 ed.).

[2] Section 3 provides in full:

"(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this chapter [Act] shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 59 Stat. 34, as amended, 61 Stat. 448, 15 U. S. C. § 1013 (1976 ed.).

[3] See n. 1, *supra*, and n. 4, *infra*.

general purpose, the Court is true to the legislative history. But I cannot understand why the Court then tries to achieve that statutory purpose by giving an unduly expansive reading to § 3 (b), when the provision that obviously was meant to accomplish that purpose was § 2 (b). Properly read, § 2 (b) suspends the federal antitrust laws only to the extent that an area or practice is regulated by state law.[4] Although the

[4] In the present case the District Court in an oral opinion held that various Rhode Island laws, including state antitrust statutes, made the federal antitrust laws generally inapplicable to the petitioners under § 2 (b). That ruling was implicitly accepted by the Court of Appeals, and has not been questioned here. See *ante*, at 540 n. 9.

The legislative history in the Senate indicates that two kinds of state regulation were thought capable of suspending the federal antitrust laws under § 2 (b). See 91 Cong. Rec. 1444 (1945) (remarks of Sen. O'Mahoney). First, a State could enact its own antitrust laws. Senator Murdock explained that "[i]nsofar as [the state laws] fail to cover the same ground covered by the Sherman Act and the Clayton Act, those [federal] acts become effective again" after the moratorium. *Ibid.* Second, a State could enact laws regulating various aspects of the business of insurance, such as rates and terms of coverage. Senator Ferguson explained that "if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding." *Id.*, at 1481. See also *id.*, at 1443 (remarks of Sen. McCarran and of Sen. Ferguson); *id.*, at 1444 (remarks of Sen. White).

This Court has had few occasions to consider the operation of § 2 (b). In *SEC* v. *National Securities, Inc.*, 393 U. S. 453, the Court held that certain Arizona regulations protecting insurance company stockholders did not regulate the "business of insurance" within the meaning of § 2 (b) and thus did not pre-empt the Securities Exchange Act of 1934. The case did not involve the antitrust proviso of § 2 (b), and hence did not decide to what extent a State must regulate the "business of insurance" to pre-empt the federal antitrust laws.

FTC v. *National Casualty Co.*, 357 U. S. 560, is the only case in this Court involving that question. There, the Court held that state statutes "prohibiting unfair and deceptive insurance practices," *id.*, at 562, pre-empted Federal Trade Commission regulations "prohibiting respondent insurance companies from carrying on certain advertising practices found by the Commission to be false, misleading, and deceptive, in violation

Court correctly notes that § 2 (b) "is not in issue in this case," *ante*, at 540, neither section can be construed entirely independently of the other.

The broad reading the Court gives to § 3 (b) seems to me not only to misconceive the larger design of the Act, but also to distort its basic purpose. Section 3 (b) is an absolute exception to § 2 (b). It brings back under the Sherman Act a range of practices, whether authorized by state law or not.[5] By construing § 3 (b) very expansively, the Court narrows the field of regulation open to the States. Yet it was clearly Congress' intent to give the States generous license to govern the business of insurance free of interference from the antitrust laws.

Because I believe that the Court's construction of § 3 (b) overlooks the role of § 2 (b) and misperceives congressional intent, I respectfully dissent.

II

It is true, as the Court says, that the McCarran-Ferguson Act fails to tell us in so many words that the phrase "boycott, coercion, or intimidation" should be read in some light other than that "tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act." *Ante*, at 541. Yet, the very selection of precisely those three words from the entire antitrust lexicon indicates that they were intended to

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of the Federal Trade Commission Act . . . ." *Id.*, at 561–562. Noting that no one had alleged that the state regulation was "mere pretense," the Court rejected the FTC's argument that the state regulation was "too 'inchoate' to be 'regulation' until [the State's statutory] prohibition has been crystallized into 'administrative elaboration of these standards and application in individual cases.'" *Id.*, at 564.

[5] In Senator Ferguson's words:

"There are certain things which a State cannot interfere with. It cannot interfere with the application of the Sherman Act to any agreement to boycott, coerce, or intimidate, or an act of boycotting, coercion, or intimidation." 91 Cong. Rec. 1443 (1945).

have some special meaning apart from traditional usage. Indeed, if "boycott" is to be given the same scope it has in Sherman Act case law, then so should "coercion" and "intimidation." But that reading of § 3 (b) would plainly devour the broad antitrust immunity bestowed by § 2 (b).[6] Congress could not logically have intended that result. To understand the special sense in which it used the words "boycott, coercion, or intimidation," therefore, we must turn to the legislative history of the McCarran-Ferguson Act.

On November 20, 1942, the Justice Department secured an indictment against a private association of stock fire insurance companies and 27 individuals for alleged violations of §§ 1 and 2 of the Sherman Act. The prosecution came as a surprise to many, because Supreme Court precedents dating back 75 years had implied that the insurance industry was not a part of interstate commerce subject to congressional regulation under the Commerce Clause.[7] On this ground, the District Court sustained the defendants' demurrer to the indictment on August 15, 1943,[8] and the Government took an appeal directly to the Supreme Court.

Uncertain about the continuing validity of many state regulations that conflicted with federal law, various insurance companies and organizations immediately sought relief from Congress. Some threatened to withhold state taxes on the ground that States were then thought to be prohibited from

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[6] Most practices condemned by the Sherman Act can be cast as an act or agreement of "boycott, coercion, or intimidation." For example, price fixing can be seen either as a refusal to deal except at a uniform price (*i. e.*, a boycott), or as an agreement to force buyers to accept an offer on the sellers' common terms (*i. e.*, coercion). Yet state-sanctioned price fixing immunized by § 2 (b) was plainly not intended to fall within the § 3 (b) exception. See 91 Cong. Rec. 1481 (1945) (remarks of Sen. Ferguson).

[7] See H. R. Rep. No. 143, 79th Cong., 1st Sess., 2 (1945).

[8] *United States* v. *South-Eastern Underwriters Assn.*, 51 F. Supp. 712 (ND Ga.).

taxing interstate commerce.[9] These threats prompted state officials to press for congressional action too. Months before the Supreme Court even heard arguments in the case, duplicate bills had been introduced in both Houses of Congress which would have given the insurance industry blanket immunity from the Sherman and Clayton Acts.[10] A joint congressional committee held extensive hearings from September 1943 into June 1944, but a vote on the bills was delayed until after the Court announced its decision.

That decision came on June 5, 1944. The Court held that the business of insurance is part of interstate commerce, and that the Congress which enacted the Sherman Act had not intended to exempt that industry. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. Of particular relevance to our inquiry is the Court's description of the unlawful activities alleged in the *South-Eastern Underwriters* indictment:

> "The member companies of S. E. U. A. controlled 90 per cent of the fire insurance and 'allied lines' sold by stock fire insurance companies in the six states where the conspiracies were consummated. Both conspiracies consisted of a continuing agreement and concert of action effectuated through S. E. U. A. The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S. E. U. A. members on S. E. U. A. terms. Companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-

[9] See H. R. Rep. No. 143, *supra*, at 2.

[10] H. R. 3270, S. 1362, 78th Cong., 1st Sess. (1943).

> S. E. U. A. companies were punished by a withdrawal of the right to represent the members of S. E. U. A.; and persons needing insurance who purchased from non-S. E. U. A. companies were threatened with boycotts and withdrawal of all patronage." *Id.*, at 535–536 (footnote omitted).

The Court concluded:

> "Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. . . . No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices." *Id.*, at 562.

Before announcement of the Court's opinion, the phrase "boycott, coercion, or intimidation" had appeared in none of the lengthy debates or numerous legislative proposals in Congress from September 1943 to May 1944.

The bill totally exempting the insurance industry from the Sherman and Clayton Acts passed the House of Representatives on June 22, 1944.[11] Although a majority of the Senate Committee recommended enactment of the House bill,[12] six members urged that the Senate not pass the bill but wait for the legislative proposal then being drafted by the National Association of Insurance Commissioners, an organization of state officials.[13] The Senate let the House bill die that session,[14] and the Committee turned its attention to the recommendation of the state insurance commissioners.

The state officials proposed a statute that, after a mora-

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[11] 90 Cong. Rec. 6510 (1944).

[12] S. Rep. No. 1112, 78th Cong., 2d Sess. (1944).

[13] *Id.*, pt. 2, at 6.

[14] 90 Cong. Rec. 8054 (1944).

torium period of several years, would have exempted from the Sherman Act a specific list of cooperative practices.[15] The proposed statute also provided: "Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation." [16] The accompanying report explained the operation and the relationship of these two provisions: [17]

> "A suspension until July 1, 1948, is requested, in which the Sherman and Clayton Acts shall not apply, in order to allow adjustments within the business and time for enactment by States of such further legislation as they may deem necessary or desirable. After July 1, 1948, it is provided that the Sherman Act shall not apply to the use of cooperative rates, forms, and underwriting plans where State-approved, to adjustment, inspection and similar agreements[,] to acts of reinsurance or co-insurance, to commission agreements, to the collection of statistics, nor to cooperative action for making of rates, rules, or plans where their use is not mandatory.

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[15] *Id.*, at A4406.

[16] *Ibid.*

[17] The report also appeared to reflect the testimony of Attorney General Biddle, who, on the day after H. R. 3270, see n. 10 *supra*, passed the House, appeared before the Senate Judiciary Subcommittee that was considering this same legislation. He assured the Subcommittee that the Government did not intend to bring new prosecutions while Congress was considering legislation on the subject, but he insisted that the *South-Eastern* case should and would go forward because of the seriousness of the charges. After quoting a portion of the Court's opinion set out in the text, *supra*, at 560–561, he stated:

"[T]hat case was not merely a price-fixing case, but involved very serious boycotting. It involved boycotting by insurance companies of agents who would not belong to the association, and under the laws of the State in which the association operated, many of the acts alleged in the indictment would have been illegal." Joint Hearing on S. 1362 et al. before the Subcommittees of the Committees on the Judiciary, 78th Cong., 2d Sess., 636 (1944).

> "No exemption is sought nor expected for oppressive or destructive practices. . . . Provision is made that the Sherman Act shall not now or hereafter be inapplicable to any act of boycott, coercion, or intimidation." 90 Cong. Rec. A4406 (1944).

This proposal formed the basis for S. 340, which was reported out with the unanimous support of the Senate Committee on the Judiciary in January 1945.[18] The list of specific practices immunized from antitrust liability was dropped, leaving the provision that suspended the Clayton and Sherman Acts for several years, during which time the States could accommodate their regulatory activities to the federal antitrust laws.[19] Even during the moratorium, however, the Sherman Act was to remain applicable to "any act of boycott, coercion, or intimidation." [20] This provision was not needed

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[18] S. Rep. No. 20, 79th Cong., 1st Sess. (1945).

[19] In the floor debates, several Senators pointed out that the bill could be read to support pre-emption of the federal antitrust laws by state regulations. 91 Cong. Rec. 480 (1945). To clarify its intent, the Senate amended S. 340 on the floor to make the antitrust laws expressly and fully applicable after the moratorium period. *Id.*, at 488.

[20] As the bill came out of committee, the boycott provision applied only to the section establishing a short-term moratorium. *Id.*, at 479. A proposal to extend the boycott provision to the full Act was offered by Senator Murdock and accepted by Senator Ferguson, *ibid.*, but was never ratified by the Senate.

That the boycott exception was originally drafted only to keep the Sherman Act partially in effect during the moratorium suggests that the provision may have been initially intended to prevent interference with the prosecution of the defendants in *South-Eastern Underwriters*, who still faced trial following the decision of this Court. Certainly, many Congressmen expressed their opposition to legislation that would free those defendants from liability. See, *e. g.*, 90 Cong. Rec. 6450 (1944) (remarks of Rep. Celler); *id.*, at 6452 (remarks of Rep. LaFollette); Joint Hearings, *supra* n. 17, at 637 (remarks of Sen. Hatch). On its face, the boycott provision removed any doubt about the Government's authority to continue with that prosecution. Whatever its initial impetus, however, there

after the moratorium because the antitrust laws would take full effect after that time. Thus, the Senate bill as finally passed made federal antitrust policy paramount to state regulation.

The House passed a version of the bill striking the opposite balance. Its bill, too, carried a moratorium provision with the boycott limitation, but at the end of that period the federal antitrust laws would be pre-empted by state regulations even insofar as acts of "boycott, coercion, or intimidation" were concerned.[21]

A Conference Committee then within a short period worked out a compromise bill which became the present McCarran-Ferguson Act. Section 2 (b) of this bill steered a middle course by making the Sherman Act, the Clayton Act, and the Federal Trade Commission Act applicable to the business of insurance after a moratorium period, but only "to the extent that such business is not regulated by State law." [22] At the same time, the "boycott, coercion, and intimidation" limitation on the States' power to confer antitrust immunity was extended beyond the moratorium period to the full life of the Act.[23]

III

From this review of the legislative history, it should be clear that the scope given both §§ 2 (b) and 3 (b) is crucial to the effectuation of the compromise struck by the 79th Congress. If § 2 (b) is construed broadly to pre-empt federal law without the need for specific state legislation and if § 3 (b) is given no effect as a limitation on that pre-emption, the original House position prevails. On the other hand, if § 3 (b) is construed as broadly as the Sherman Act itself, then the original Senate version largely prevails, no matter how § 2 (b) is interpreted.

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is no indication that the provision was finally thought to be applicable only to the *South-Eastern* litigation.

[21] See 91 Cong. Rec. 1085 (1945); see also *id.*, at 1484–1485.

[22] See n. 1, *supra*.

[23] See n. 2, *supra*.

Congress clearly intended a middle position between these extremes. That position cannot be given effect unless § 2 (b) is read to pre-empt federal law only to the extent the States have actually regulated a particular area, and § 3 (b) is viewed as referring to a range of evils considerably narrower than those prohibited by the Sherman Act.

From the legislative debates on S. 340, the Committee Reports, and the design of the statute itself, it is evident that the "boycott, coercion, or intimidation" provision is most fairly read as referring to the kinds of antitrust violations alleged in *South-Eastern Underwriters*—that is, attempts by members of the insurance business to force other members to follow the industry's private rules and practices. Repeatedly, Congressmen involved in the drafting of the statute drew a distinction between state regulation and private regulation.[24] Congress plainly wanted to allow the States to authorize anticompetitive practices which they determined to be in the public interest, as indicated by formal state approval.[25] Section 2 (b) does just that. Congress just as plainly wanted to make sure that private organizations set up to govern the industry, such as the South-Eastern Underwriters Association, would not escape the reach of the federal antitrust laws. Section 2 (b) also meets this concern to the extent that States do not authorize or sanction anticompetitive practices promoted by such organizations. But § 2 (b) leaves open the possibility that States might, at the prompting of these powerful organizations, enact merely permissive regulations sufficiently specific to confer antitrust immunity, thus leaving those organizations free to coerce compliance from uncooperative competitors. Properly construed, § 3 (b) fills this gap by keeping the Sherman Act fully applicable to *private enforcement*—by the means described in the *South-Eastern*

[24] See, *e. g.*, 91 Cong. Rec. 1480, 1483, 1485 (1945) (remarks of Sen. O'Mahoney); *id.*, at 1481 (remarks of Sen. Ferguson).

[25] See *id.*, at 1486 (remarks of Sen. O'Mahoney).

Underwriters case—of industry rules and practices, even if those rules and practices are permitted by state law.[26] Similarly, where a State enacts its own antitrust laws conferring § 2 (b) immunity, § 3 (b) retains Sherman Act coverage for those especially "destructive . . . practices," 322 U. S., at 562, involved in *South-Eastern Underwriters*.

The key feature of § 3 (b), then, is that the agreement or act of "boycott, coercion, or intimidation" must be aimed ultimately at a member of the insurance industry. As in *South-Eastern Underwriters*, the immediate targets may be policyholders or others outside the industry, but unless they are boycotted, coerced, or intimidated for the purpose of forcing other insurance companies or agents to comply with industry rules, § 3 (b) does not apply.

It follows, then, that § 3 (b) does not reach the boycott alleged in this case. The respondents' complaint does not contend that petitioner insurance companies refused to sell them insurance with the ultimate aim of disciplining or coercing other insurance companies. Rather, if there was an agreement among the petitioners, the complaint would indicate that it was entirely voluntary.

I would reverse the judgment of the Court of Appeals.

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[26] See *id.*, at 1485–1486 (remarks of Sen. O'Mahoney).

Syllabus

FURNCO CONSTRUCTION CORP. *v.* WATERS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77–369. Argued April 17, 1978—Decided June 29, 1978

Petitioner corporation specializes in relining blast furnaces with "firebrick." It maintains no permanent force of bricklayers but delegates to the superintendent of a particular job the task of hiring a work force. Respondents, three black bricklayers, sought employment with petitioner on a particular job, but two of them, though fully qualified, were never offered employment, and the third was hired only long after he had initially applied. The job superintendent, pursuant to industry practice, did not accept applications at the jobsite but hired only bricklayers who he knew were experienced and competent or who had been recommended to him as similarly skilled. Respondents brought suit against petitioner claiming employment discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court held, *inter alia*, that respondents had not proved a case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, and that petitioner's hiring practices were justified as a "business necessity" in that they were required for the safe and efficient operation of petitioner's business. The Court of Appeals reversed, holding that respondents had made out a prima facie case of employment discrimination under *McDonnell Douglas*, which petitioner had not effectively rebutted. Disagreeing with the District Court's finding that petitioner's hiring practices were justified as a business necessity, the Court of Appeals devised a hiring procedure whereby petitioner would take written applications, with inquiry as to qualifications and experience, and then check, evaluate, and compare those claims against the qualifications and experience of other bricklayers with whom the superintendent was already acquainted, thereby allowing petitioner to consider the qualifications of more minority applicants. *Held:* The Court of Appeals erred in its treatment of the nature of the evidence necessary to rebut a prima facie case under *McDonnell Douglas*, and in substituting its own judgment as to the proper hiring practices for an employer who claims its hiring practices do not violate Title VII. Pp. 575–580.

(a) While the Court of Appeals was justified in concluding that as a matter of law respondents had made out a prima facie case of discrimination under *McDonnell Douglas*, the court went awry in apparently equating such a prima facie showing with an ultimate finding

of fact as to discriminatory refusal to hire under Title VII, and the court's imposition of a hiring method enabling the employer to consider, and perhaps to hire, more minority employees finds no support in either the nature of the prima facie case or Title VII's purpose. Courts may not impose such a remedy on an employer at least until a violation of Title VII has been proved, and here none had been proved under the reasoning of either the District Court or the Court of Appeals. Pp. 575–578.

(b) The Court of Appeals also appears improperly to have concluded that once a *McDonnell Douglas* prima facie showing had been made out, statistics offered by petitioner to show that its work force was racially balanced were totally irrelevant to the question of motive. A *McDonnell Douglas* showing is not the equivalent of a factual finding of discrimination but simply proof of actions taken by the employer from which discriminatory animus can be inferred because experience has proved that in the absence of any other explanation it is more likely than not those actions were based on impermissible considerations. The employer, therefore, must be allowed some latitude to introduce evidence bearing on his motive. Thus, although petitioner's statistics were not and could not be sufficient to demonstrate *conclusively* that its actions were not discriminatorily motivated, the District Court was entitled to *consider* the racial mix of the work force when making a determination as to motivation, and the Court of Appeals should likewise give similar consideration to such proof in any further proceedings. Pp. 579–580.

551 F. 2d 1085, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, J., joined, *post*, p. 581.

Joel H. Kaplan argued the cause for petitioner. With him on the briefs were *Zachary D. Fasman* and *Alvin M. Glick*.

Judson H. Miner argued the cause for respondents. With him on the brief were *Charles Barnhill, Jr., Jack Greenberg, James M. Nabrit III, O. Peter Sherwood, Eric Schnapper*, and *Barry L. Goldstein*.*

*Briefs of *amici curiae* were filed by *Solicitor General McCree, Assistant Attorney General Days, Brian K. Landsberg, Robert J. Reinstein*, and

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents are three black bricklayers who sought employment with petitioner Furnco Construction Corp. Two of the three were never offered employment. The third was employed only long after he initially applied. Upon adverse findings entered after a bench trial, the District Court for the Northern District of Illinois held that respondents had not proved a claim under either the "disparate treatment" theory of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), or the "disparate impact" theory of *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). The Court of Appeals for the Seventh Circuit, concluding that under *McDonnell Douglas* respondents had made out a prima facie case which had not been effectively rebutted, reversed the judgment of the District Court. 551 F. 2d 1085 (1977). We granted certiorari to consider important questions raised by this case regarding the exact scope of the prima facie case under *McDonnell Douglas* and the nature of the evidence necessary to rebut such a case. 434 U. S. 996 (1977). Having concluded that the Court of Appeals erred in its treatment of the latter question, we reverse and remand to that court for further proceedings consistent with this opinion.

I

A few facts in this case are not in serious dispute. Petitioner Furnco, an employer within the meaning of §§ 701 (b) and (h) of Title VII of the 1964 Civil Rights Act, 42 U. S. C. §§ 2000e (b) and (h) (1970 ed., Supp. V), specializes in refractory installation in steel mills and, more particularly, the rehabilitation or relining of blast furnaces with what is called in the trade "firebrick." Furnco does not, however, maintain a permanent force of bricklayers. Rather, it hires a superintendent for a specific job and then delegates to him

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Abner W. Sibal for the United States et al.; and by *Robert E. Williams* and *Frank C. Morris, Jr.*, for the Equal Employment Advisory Council.

the task of securing a competent work force. In August 1971, Furnco contracted with Interlake, Inc., to reline one of its blast furnaces. Joseph Dacies, who had been a job superintendent for Furnco since 1965, was placed in charge of the job and given the attendant hiring responsibilities. He did not accept applications at the jobsite, but instead hired only persons whom he knew to be experienced and competent in this type of work or persons who had been recommended to him as similarly skilled. He hired his first four bricklayers, all of whom were white, on two successive days in August, the 26th and 27th, and two in September, the 7th and 8th. On September 9 he hired the first black bricklayer. By September 13, he had hired 8 more bricklayers, 1 of whom was black; by September 17, 7 more had been employed, another of whom was black; and by September 23, 17 more were on the payroll, again with 1 black included in that number.[1] From October 12 to 18, he hired 6 bricklayers, all of whom were black, including respondent Smith, who had worked for Dacies previously and had applied at the jobsite somewhat earlier. Respondents Samuels and Nemhard were not hired, though they were fully qualified and had also attempted to secure employment by appearing at the jobsite gate. Out of the total of 1,819 man-days worked on the Interlake job, 242, or 13.3%, were worked by black bricklayers.

Many of the remaining facts found by the District Court and the inferences to be drawn therefrom are in some dispute between the parties, but none was expressly found by the Court of Appeals to be clearly erroneous. The District Court elaborated at some length as to the "critical" necessity of insuring that only experienced and highly qualified fire-

[1] Respondents contend that two of these four blacks were not actually "hired," but merely "transferred" from another Furnco job. Brief for Respondents 7–8. Both the District Court and the Court of Appeals spoke only of "hiring" bricklayers, however, and those parts of the record to which respondents point do not persuade us that this is a mischaracterization.

bricklayers were employed. Improper or untimely work would result in substantial losses both to Interlake, which was forced to shut down its furnace and lay off employees during the relining job, and to Furnco, which was paid for this work at a fixed price and for a fixed time period. In addition, not only might shoddy work slow this work process down, but it also might necessitate costly future maintenance work with its attendant loss of production and employee layoffs; diminish Furnco's reputation and ability to secure similar work in the future; and perhaps even create serious safety hazards, leading to explosions and the like. App. to Pet. for Cert. A13–A15. These considerations justified Furnco's refusal to engage in on-the-job training or to hire at the gate, a hiring process which would not provide an adequate method of matching qualified applications to job requirements and assuring that the applicants are sufficiently skilled and capable. *Id.*, at A18–A19. Furthermore, there was no evidence that these policies and practices were a pretext to exclude black bricklayers or were otherwise illegitimate or had a disproportionate impact or effect on black bricklayers. *Id.*, at A17–A18. From late 1969 through late 1973, 5.7% of the bricklayers in the relevant labor force were minority group members, see 41 CFR § 60–11 *et seq.* (1977),[2] while, as mentioned before,

[2] Respondents attempted to introduce a study conducted in late 1973 by the local union which matched members' names and race in an effort to show what percentage of the union membership was black. The study concluded that approximately 500 of the 3,800 union members were black. The District Court excluded this evidence because the study had been conducted two years after Furnco completed its job. App. to Pet. for Cert. A16 n. 1. The Court of Appeals thought rejection of this evidence was an abuse of discretion, but in dealing with the merits did not rely on the racial proportions in the labor force, so did not remand the case to permit introduction of that testimony. The Court of Appeals also noted that in any event respondents suffered no prejudice by the court's refusal to admit the study because it would not have demonstrated discrimination. The study showed that 13.7% of the membership of the union was black,

13.3% of the man-days on Furnco's Interlake job were worked by black bricklayers.

Because of the above considerations and following the established practice in the industry, most of the firebricklayers hired by Dacies were persons known by him to be experienced and competent in this type of work. The others were hired after being recommended as skilled in this type of work by his general foreman, an employee (a black), another Furnco superintendent in the area, and Furnco's General Manager John Wright. Wright had not only instructed Dacies to employ, as far as possible, at least 16% black bricklayers, a policy due to Furnco's self-imposed affirmative-action plan to insure that black bricklayers were employed by Furnco in Cook County in numbers substantially in excess of their percentage in the local union,[3] but he had also recommended, in an effort to show good faith, that Dacies hire several specific bricklayers, who had previously filed a discrimination suit against Furnco, negotiations for the settlement of which had only recently broken down, see n. 3, *supra*.

From these factual findings, the District Court concluded that respondents had failed to make out a Title VII claim under the doctrine of *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Furnco's policy of not hiring at the gate was racially neutral on its face and there was no showing that it had a disproportionate impact or effect. App. to Pet. for Cert. A20–A21. It also held that respondents had failed to

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while the evidence demonstrated that 13.3% of the man-days were worked by black bricklayers, Furnco had set a goal of 16% black bricklayers, and 20% of the individuals hired were black. 551 F. 2d 1085, 1090 (1977).

[3] According to the District Court, this affirmative-action program was initiated by Furnco following a job performed in 1969–1970 from which charges of racial discrimination in hiring were filed by several black bricklayers. These claims are apparently still pending on appeal in the Illinois courts and the merits of a parallel federal action remain to be adjudicated. See App. to Pet. for Cert. A15; *Batiste* v. *Furnco Construction Corp.*, 503 F. 2d 447 (CA7 1974).

prove a case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). App. to Pet. for Cert. A21. It is not entirely clear whether the court thought respondents had failed to make out a prima facie case of discrimination under *McDonnell Douglas*, see App. to Pet. for Cert. A20–A21, but the court left no doubt that it thought Furnco's hiring practices and policies were justified as a "business necessity" in that they were required for the safe and efficient operation of Furnco's business, and were "not used as a pretext to exclude Negroes." Thus, even if a prima facie case had been made out, it had been effectively rebutted. *Id.*, at A21.

> "Not only have Plaintiffs entirely failed to establish that Furnco's employment practices on the Interlake job discriminated against them on the basis of race or constituted retaliatory conduct but Defendant has proven what it was not required to. By its cross-examination and direct evidence, Furnco has proven beyond all reasonable doubt that it did not engage in either racial discrimination or retaliatory conduct in its employment practices in regard to bricklayers on the Interlake job." [4] *Id.*, at A22.

The Court of Appeals reversed, holding that respondents had made out a prima facie case under *McDonnell Douglas*, *supra*, at 802, which Furnco had not effectively rebutted. Because of the "historical inequality of treatment of black workers" [5] and the fact that the record failed to reveal that

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[4] The District Court also found that certain other plaintiffs never attempted to apply for work at Interlake or were fired or not hired for valid reasons, such as insubordination or poor workmanship. App. to Pet. for Cert. A17–A19. The Court of Appeals, concluding that the District Court's findings were not clearly erroneous, affirmed the judgment against these particular plaintiffs. 551 F. 2d, at 1087–1088. These rulings are not challenged here.

[5] The court stated:

"The historical inequality of treatment of black workers seems to us to

any white persons had applied at the gate, the Court of Appeals rejected Furnco's argument that discrimination had not been shown because a white appearing at the jobsite would have fared no better than respondents. That court also disagreed with Furnco's contention, which the District Court had adopted, that "the importance of selecting people whose capability had been demonstrated to defendant's brick superintendent is a 'legitimate, nondiscriminatory reason' for defendant's refusal to consider plaintiffs." 551 F. 2d, at 1088. Instead, the appellate court proceeded to devise what it thought would be an appropriate hiring procedure for Furnco, saying that "[i]t seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent." *Ibid.* This middle course, according to the Court of Appeals, was to take written applications, with inquiry as to qualifications and experience, and then check, evaluate, and compare those claims against the qualifications and experience of other bricklayers with whom the superintendent was already acquainted. We granted certiorari to consider whether the Court of Appeals had gone too far in substituting its own judgment as to proper hiring practices in the case of an employer which claimed the practices it had chosen did not violate Title VII.[6]

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establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft, itself the result of past discrimination?" 551 F. 2d, at 1089.

[6] The petition for certiorari set out three questions:

"1. Whether the Seventh Circuit, in reversing the judgment of the District Court, erred in finding as irrelevant to the issue of racial discrimination in hiring, statistics demonstrating that in hiring highly skilled bricklayers, the employer hired Negroes in a percentage far in excess of their statistical presence in the relevant labor force.

"2. Whether a court may find an employer guilty of racial discrimination

II

A

We agree with the Court of Appeals that the proper approach was the analysis contained in *McDonnell Douglas, supra.*[7] We also think the Court of Appeals was justified in concluding that as a matter of law respondents made out a prima facie case of discrimination under *McDonnell Douglas.* In that case we held that a plaintiff could make out a prima facie claim by showing

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U. S., at 802 (footnote omitted).

This, of course, was not intended to be an inflexible rule, as the Court went on to note that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily appli-

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in employment due to alleged disparate treatment in hiring without a finding of discriminatory intent or motive.

"3. Whether a hiring practice not shown to result in disparate impact or treatment of prospective minority employees and found by the District Court to be justified by business necessity and legitimate business reasons may be found to be racially discriminatory by the Court of Appeals merely because it is subjective and because the Court of Appeals substitutes its judgment for that of the District Court as to what constitutes legitimate business reasons." Pet. for Cert. 2.

[7] This case did not involve employment tests, which we dealt with in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), and in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 412–413 (1975), or particularized requirements such as the height and weight specifications considered in *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977), and it was not a "pattern or practice" case like *Teamsters* v. *United States*, 431 U. S. 324, 358 (1977).

cable in every respect to differing factual situations." *Id.*, at 802 n. 13. See *Teamsters* v. *United States*, 431 U. S. 324, 358 (1977). But *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." 431 U. S., at 358. See also *id.*, at 335 n. 15. And here respondents carried that initial burden by proving they were members of a racial minority; they did everything within their power to apply for employment; Furnco has conceded that they were qualified in every respect for the jobs which were about to be open;[8] they were not offered employment, although Smith later was; and the employer continued to seek persons of similar qualifications.

B

We think the Court of Appeals went awry, however, in apparently equating a prima facie showing under *McDonnell Douglas* with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different and that difference has a direct bearing on the proper resolution of this case. The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of that second

[8] We note that this case does not raise any questions regarding exactly what sort of requirements an employer can impose upon any particular job. Furnco has conceded that for all its purposes respondents were qualified in every sense. Thus, with respect to the *McDonnell Douglas* prima facie case, the only question it places in issue is whether its refusal to consider respondents' applications at the gate was based upon legitimate, nondiscriminatory reasons and therefore permissible.

requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII.

The central focus of the inquiry in a case such as this is always whether the employer is treating "some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters* v. *United States, supra,* at 335 n. 15. The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. See *Teamsters* v. *United States, supra,* at 358 n. 44. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

When the prima facie case is understood in the light of the opinion in *McDonnell Douglas,* it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII prohibits him from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of

minority employees. To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U. S., at 802.

The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the "best" hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but also there is nothing in the record to indicate that it would be any less "haphazard, arbitrary, and subjective" than Furnco's method, which the Court of Appeals criticized as deficient for exactly those reasons. Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.

This is not to say, of course, that proof of a justification which is reasonably related to the achievement of some legitimate goal necessarily ends the inquiry. The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. And as we noted in *McDonnell Douglas, supra,* at 804–805, this evidence might take a variety of forms. But the Court of Appeals, although stating its disagreement with the District Court's conclusion that the employer's hiring practices were a "legitimate, nondiscriminatory reason" for refusing to hire respondents, premised its disagreement on a view which we have discussed and rejected above. It did not conclude that the practices were a pretext for discrimination, but only that different practices would have enabled the employer to at least consider, and perhaps to hire, more minority employees. But courts may not impose such a remedy on an employer at least until a violation of Title VII has been proved, and here none had been under the reasoning of either the District Court or the Court of Appeals.

C

The Court of Appeals was also critical of petitioner's effort to employ statistics in this type of case. While the matter is not free from doubt, it appears that the court thought that once a *McDonnell Douglas* prima facie showing had been made out, statistics of a racially balanced work force were totally irrelevant to the question of motive. See 551 F. 2d, at 1089. That would undoubtedly be a correct view of the matter if the *McDonnell Douglas* prima facie showing were the equivalent of an ultimate finding by the trier of fact that the original rejection of the applicant was racially motivated: A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination. As we said in *Teamsters* v. *United States,* 431 U. S., at 341–342:

> "[T]he District Court and the Court of Appeals found upon substantial evidence that the company had engaged in a course of discrimination that continued well after the effective date of Title VII. The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it."

See also *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 412–413 (1975.) It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs* v. *Duke Power Co.,* 401 U. S., at 430; *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U. S. 273, 279 (1976).

A *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which

we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations. When the prima facie showing is understood in this manner, the employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated. Thus, although we agree with the Court of Appeals that in this case such proof neither was nor could have been sufficient to *conclusively* demonstrate that Furnco's actions were not discriminatorily motivated, the District Court was entitled to *consider* the racial mix of the work force when trying to make the determination as to motivation. The Court of Appeals should likewise give similar consideration to the proffered statistical proof in any further proceedings in this case.

III

The parties also press upon the Court a large number of alternative theories of liability and defense,[9] none of which were directly addressed by the Court of Appeals as we read its opinion. Given the present posture of this case, however,

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[9] Respondents, for example, argue that regardless of the propriety of Furnco's general refusal to hire at the gate or of a general policy of hiring only bricklayers known to the superintendent or referred to him by an insider, a foreman, or another bricklayer, Dacies' particular method of hiring was discriminatory. Thus, the general hiring practice, though perhaps legitimate in the abstract, was discriminatorily applied in this case, and cannot be used to rebut the prima facie case. Brief for Respondents 19–26. In particular, respondents argue that the evidence proved that Dacies hired from a "list" he had prepared, which allegedly included

we think those matters which are still preserved for review are best decided by the Court of Appeals in the first instance. Accordingly, we decline to address them as an original matter here. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

It is well established under Title VII that claims of employment discrimination because of race may arise in two different

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competent firebricklayers with whom he had worked, but in fact included only white firebricklayers with whom he had worked. Exclusion from this list of competent blacks with whom he had worked, such as respondents Smith and Samuels, was itself discriminatory and thus cannot be used to rebut respondents' prima facie case.

Furnco, on the other hand, vigorously disputes that Dacies hired only from this list and that the hiring process can be as neatly broken down into various components as respondents would like. It argues that even if most of the people with whom Dacies was familiar were white, Dacies made a concerted effort to speak with people who were familiar with competent black bricklayers and then hired a large number of black bricklayers. In fact, argues Furnco, the statistics indicate that he hired a disproportionately large number of blacks, thus clearly indicating that his so-called "list" certainly could not have been the exclusive source of potential employees even if it had been all white. It further disputes the notion that Furnco or Dacies had in any way put some sort of ceiling on the maximum number of blacks they were willing to hire. It asserts there is absolutely nothing in the record to support such a conclusion.

The District Court made no findings which would support respondents' view of the evidence. The Court of Appeals mentioned the existence of such a list, 551 F. 2d, at 1086, but we do not read its opinion as expressly relying on this point either. Rather, as we read its opinion, the court found only that respondents had made out a prima facie case under *McDonnell Douglas* and that, for the reasons outlined in the text, Furnco had failed to rebut that prima facie case. On remand, respondents are of course free to pursue any such contentions which have been properly preserved.

ways. *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977). An individual may allege that he has been subjected to "disparate treatment" because of his race, or that he has been the victim of a facially neutral practice having a "disparate impact" on his racial group. The Court today concludes that the Court of Appeals was correct in treating this as a disparate-treatment case controlled by *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).

Under *McDonnell Douglas*, a plaintiff establishes a prima facie case of employment discrimination through disparate treatment by showing

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.*, at 802 (footnote omitted).

Once a plaintiff has made out this prima facie case, the burden shifts to the employer who must prove that he had a "legitimate, nondiscriminatory reason for the [plaintiff's] rejection." *Ibid.*

The Court of Appeals properly held that respondents had made out a prima facie case of employment discrimination under *McDonnell Douglas*. Once respondents had established their prima facie case, the question for the court was then whether petitioner had carried its burden of proving that respondents were rejected on the basis of legitimate nondiscriminatory considerations. The court, however, failed properly to address that question and instead focused on what other hiring practices petitioner might employ. I therefore agree with the Court that we must remand the case to the Court of Appeals so that it can address, under the appropriate standards, whether petitioner had rebutted respondents' prima facie showing of disparate treatment. I also agree that on remand

the Court of Appeals is to address the other theories of liability which respondents have presented. See *ante*, at 580, and n. 9.

Where the Title VII claim is that a facially neutral employment practice actually falls more harshly on one racial group, thus having a disparate impact on that group, our cases establish a different way of proving the claim. See, *e. g.*, *Teamsters*, *supra*, at 336 n. 15, 349; *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977); *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 137 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 422, 425 (1975); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430–432 (1971). As set out by the Court in *Griggs* v. *Duke Power Co.*, to establish a prima facie case on a disparate-impact claim, a plaintiff need not show that the employer had a discriminatory intent but need only demonstrate that a particular practice in actuality "operates to exclude Negroes." *Id.*, at 431.

Once the plaintiff has established the disparate impact of the practice, the burden shifts to the employer to show that the practice has "a manifest relationship to the employment in question." *Id.*, at 432. The "touchstone is business necessity," *id.*, at 431, and the practice "must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." *Dothard* v. *Rawlinson*, *supra*, at 332 n. 14. Under this principle, a practice of limiting jobs to those with prior experience working in an industry or for a particular person, or to those who hear about jobs by word of mouth would be invalid if the practice in actuality impacts more harshly on a group protected under Title VII, unless the practice can be justified by business necessity.

There is nothing in today's opinion that is inconsistent with this approach or with our prior decisions. I must dissent, however, from the Court's apparent decision, see *ante*, at 575, to foreclose on remand further litigation on the *Griggs* question of whether petitioner's hiring practices had a disparate impact.

Respondents claim that petitioner's practice of hiring from a list of those who had previously worked for the foreman foreclosed Negroes from consideration for the vast majority of jobs. Although the foreman also hired a considerable number of Negroes through other methods, respondents assert that the use of other methods to augment the representation of Negroes in the work force does not answer whether the primary hiring practice is discriminatory.

It is clear that an employer cannot be relieved of responsibility for past discriminatory practices merely by undertaking affirmative action to obtain proportional representation in his work force. As the Court said in *Teamsters*, and reaffirms today, a "company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier . . . discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it." 431 U. S., at 341–342; *ante*, at 579. Therefore, it is at least an open question whether the hiring of workers primarily from a list of past employees would, under *Griggs*, violate Title VII where the list contains no Negroes but the company uses additional methods of hiring to increase the numbers of Negroes hired.*

The Court today apparently assumes that the Court of Appeals affirmed the District Court's findings that petitioner's hiring practice had no disparate impact. I cannot agree with that assumption. Because the Court of Appeals disposed of this case under the *McDonnell Douglas* analysis, it had no occasion to address those findings of the District Court pertaining to disparate impact. Although the Court of Appeals did discuss *Griggs* in its opinion, 551 F. 2d 1085, 1089–1090 (1977), as I read that discussion the court was merely rejecting petitioner's argument that it could defeat respondents'

*Of course, the Court leaves open on remand the issue of whether Furnco's use of the list violated Title VII under a disparate-treatment theory. See *ante*, at 581 n. 9.

McDonnell Douglas claim by showing that the work force had a large percentage of Negro members. I express no view on the issue of whether respondents' claim should prevail on the facts presented here since that question is not presently before us, but I believe that respondents' opportunity to make their claim should not be foreclosed by this Court.

LOCKETT *v.* OHIO

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 76-6997. Argued January 17, 1978—Decided July 3, 1978

The Ohio death penalty statute provides that once a defendant is found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty must be imposed unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the sentencing judge determines that at least one of the following circumstances is established by a preponderance of the evidence: (1) the victim induced or facilitated the offense; (2) it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; or (3) the offense was primarily the product of the offender's psychosis or mental deficiency. Petitioner, whose conviction of aggravated murder with specifications that it was committed to escape apprehension for, and while committing or attempting to commit, aggravated robbery, and whose sentence to death were affirmed by the Ohio Supreme Court, makes various challenges to the validity of her conviction, and attacks the constitutionality of the death penalty statute on the ground, *inter alia*, that it does not give the sentencing judge a full opportunity to consider mitigating circumstances in capital cases as required by the Eighth and Fourteenth Amendments. *Held:* The judgment is reversed insofar as it upheld the death penalty, and the case is remanded. Pp. 594–609; 613–619; 619–621; 624–628.

49 Ohio St. 2d 48, 358 N. E. 2d 1062, reversed in part and remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II, concluding:

1. The prosecutor's closing references to the State's evidence as "unrefuted" and "uncontradicted" (no evidence having been introduced to rebut the prosecutor's case after petitioner decided not to testify) did not violate the constitutional prohibitions against commenting on an accused's failure to testify, where petitioner's counsel had already focused the jury's attention on her silence by promising a defense and telling the jury that she would testify. Pp. 594–595.

2. The exclusion from the venire of four prospective jurors who made it "unmistakably clear" that, because of their opposition to the death penalty, they could not be trusted to "abide by existing law" and to

"follow conscientiously" the trial judge's instructions, *Boulden* v. *Holman*, 394 U. S. 478, 484, did not violate petitioner's Sixth and Fourteenth Amendment rights under the principles of *Witherspoon* v. *Illinois*, 391 U. S. 510, or *Taylor* v. *Louisiana*, 419 U. S. 522. Pp. 595–597.

3. Petitioner's contention that the Ohio Supreme Court's interpretation of the complicity provision of the statute under which she was convicted was so unexpected that it deprived her of fair warning of the crime with which she was charged, is without merit. The court's construction was consistent with both prior Ohio law and the statute's legislative history. P. 597.

THE CHIEF JUSTICE, joined by MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, concluded, in Part III, that the limited range of mitigating circumstances that may be considered by the sentencer under the Ohio death penalty statute is incompatible with the Eighth and Fourteenth Amendments. Pp. 597–609.

(a) The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Pp. 604–605.

(b) The need for treating each defendant in a capital case with the degree of respect due the uniqueness of the individual is far more important than in noncapital cases, particularly in view of the unavailability with respect to an executed capital sentence of such postconviction mechanisms in noncapital cases as probation, parole, and work furloughs. P. 605.

(c) A statute that prevents the sentencer in capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty, and when the choice is between life and death, such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. P. 605.

(d) The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments. Only the three factors specified in the statute can be considered in mitigation of the defendant's sentence, and once it is determined that none of those factors is present, the statute mandates the death sentence. Pp. 606–608.

MR. JUSTICE WHITE concluded that petitioner's death sentence should

be vacated on the ground that the Ohio death penalty statute permits a defendant convicted of aggravated murder with specifications to be sentenced to death, as petitioner was in this case, without a finding that he intended death to result. Pp. 624–628.

MR. JUSTICE MARSHALL, being of the view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth Amendment, concurred in the judgment insofar as it vacates petitioner's death sentence, and also concurred in the judgment insofar as it affirms her conviction. Pp. 619–621.

MR. JUSTICE BLACKMUN concluded that petitioner's death sentence should be vacated on the grounds that (1) the Ohio death penalty statute is deficient in regard to petitioner, a nontriggerman charged with aiding and abetting a murder, in failing to allow consideration of the extent of petitioner's involvement, or the degree of her *mens rea*, in the commission of the homicide, and (2) the procedure provided by an Ohio Rule of Criminal Procedure giving the sentencing court full discretion to bar the death sentence "in the interests of justice" *if* the defendant pleads guilty or no contest, but no such discretion if the defendant goes to trial, creates an unconstitutional disparity of sentencing alternatives, *United States* v. *Jackson*, 390 U. S. 570. Pp. 613–619.

BURGER, C. J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I and II, in which STEWART, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and an opinion with respect to Part III, in which STEWART, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 613. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 619. WHITE, J., filed an opinion concurring in part, concurring in the judgment, and dissenting in part, *post*, p. 621. REHNQUIST, J., filed an opinion concurring in part and dissenting in part, *post*, p. 628. BRENNAN, J., took no part in the consideration or decision of the case.

Anthony G. Amsterdam argued the cause for petitioner. With him on the brief were *Max Kravitz, Jack Greenberg, James M. Nabrit III, Joel Berger, David E. Kendall,* and *Peggy C. Davis.*

Carl M. Layman III argued the cause for respondent. With him on the brief were *Stephan M. Gabalac* and *James A. Rudgers.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court with respect to the constitutionality of petitioner's conviction (Parts I and II), together with an opinion (Part III), in which MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS joined, on the constitutionality of the statute under which petitioner was sentenced to death, and announced the judgment of the Court.

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Sandra Lockett to death pursuant to a statute [1] that narrowly limits the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.

I

Lockett was charged with aggravated murder with the aggravating specifications (1) that the murder was "committed for the purpose of escaping detection, apprehension, trial, or punishment" for aggravated robbery, and (2) that the murder was "committed while . . . committing, attempting to commit, or fleeing immediately after committing or attempting to commit . . . aggravated robbery." That offense was punishable by death in Ohio. See Ohio Rev. Code Ann. §§ 2929.03, 2929.04 (1975). She was also charged with aggravated robbery. The State's case against her depended largely upon the testimony of a coparticipant, one Al Parker, who gave the following account of her participation in the robbery and murder.

Lockett became acquainted with Parker and Nathan Earl Dew while she and a friend, Joanne Baxter, were in New Jersey. Parker and Dew then accompanied Lockett, Baxter, and Lockett's brother back to Akron, Ohio, Lockett's home-

[1] The pertinent provisions of the Ohio death penalty statute appear as an appendix to this opinion.

town. After they arrived in Akron, Parker and Dew needed money for the trip back to New Jersey. Dew suggested that he pawn his ring. Lockett overheard his suggestion, but felt that the ring was too beautiful to pawn, and suggested instead that they could get some money by robbing a grocery store and a furniture store in the area. She warned that the grocery store's operator was a "big guy" who carried a "45" and that they would have "to get him real quick." She also volunteered to get a gun from her father's basement to aid in carrying out the robberies, but by that time, the two stores had closed and it was too late to proceed with the plan to rob them.

Someone, apparently Lockett's brother, suggested a plan for robbing a pawnshop. He and Dew would enter the shop and pretend to pawn a ring. Next Parker, who had some bullets, would enter the shop, ask to see a gun, load it, and use it to rob the shop. No one planned to kill the pawnshop operator in the course of the robbery. Because she knew the owner, Lockett was not to be among those entering the pawnshop, though she did guide the others to the shop that night.

The next day Parker, Dew, Lockett, and her brother gathered at Baxter's apartment. Lockett's brother asked if they were "still going to do it," and everyone, including Lockett, agreed to proceed. The four then drove by the pawnshop several times and parked the car. Lockett's brother and Dew entered the shop. Parker then left the car and told Lockett to start it again in two minutes. The robbery proceeded according to plan until the pawnbroker grabbed the gun when Parker announced the "stickup." The gun went off with Parker's finger on the trigger, firing a fatal shot into the pawnbroker.

Parker went back to the car where Lockett waited with the engine running. While driving away from the pawnshop, Parker told Lockett what had happened. She took the gun from the pawnshop and put it into her purse. Lockett and

Parker drove to Lockett's aunt's house and called a taxicab. Shortly thereafter, while riding away in a taxicab, they were stopped by the police, but by this time Lockett had placed the gun under the front seat. Lockett told the police that Parker rented a room from her mother and lived with her family. After verifying this story with Lockett's parents, the police released Lockett and Parker. Lockett hid Dew and Parker in the attic when the police arrived at the Lockett household later that evening.

Parker was subsequently apprehended and charged with aggravated murder with specifications, an offense punishable by death, and aggravated robbery. Prior to trial, he pleaded guilty to the murder charge and agreed to testify against Lockett, her brother, and Dew. In return, the prosecutor dropped the aggravated robbery charge and the specifications to the murder charge, thereby eliminating the possibility that Parker could receive the death penalty.

Lockett's brother and Dew were later convicted of aggravated murder with specifications. Lockett's brother was sentenced to death, but Dew received a lesser penalty because it was determined that his offense was "primarily the product of mental deficiency," one of the three mitigating circumstances specified in the Ohio death penalty statute.

Two weeks before Lockett's separate trial, the prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery (offenses which each carried a maximum penalty of 25 years' imprisonment and a maximum fine of $10,000, see Ohio Rev. Code Ann. §§ 2903.03, 2911.01, 2929.11 (1975)) if she would cooperate with the State, but she rejected the offer. Just prior to her trial, the prosecutor offered to permit her to plead guilty to aggravated murder without specifications, an offense carrying a mandatory life penalty, with the understanding that the aggravated robbery charge and an outstanding forgery charge would be dismissed. Again she rejected the offer.

At trial, the opening argument of Lockett's defense counsel summarized what appears to have been Lockett's version of the events leading to the killing. He asserted the evidence would show that, as far as Lockett knew, Dew and her brother had planned to pawn Dew's ring for $100 to obtain money for the trip back to New Jersey. Lockett had not waited in the car while the men went into the pawnshop but had gone to a restaurant for lunch and had joined Parker, thinking the ring had been pawned, after she saw him walking back to the car. Lockett's counsel asserted that the evidence would show further that Parker had placed the gun under the seat in the taxicab and that Lockett had voluntarily gone to the police station when she learned that the police were looking for the pawnbroker's killers.

Parker was the State's first witness. His testimony related his version of the robbery and shooting, and he admitted to a prior criminal record of breaking and entering, larceny, and receiving stolen goods, as well as bond jumping. He also acknowledged that his plea to aggravated murder had eliminated the possibility of the death penalty, and that he had agreed to testify against Lockett, her brother, and Dew as part of his plea agreement with the prosecutor. At the end of the major portion of Parker's testimony, the prosecutor renewed his offer to permit Lockett to plead guilty to aggravated murder without specifications and to drop the other charges against her. For the third time Lockett refused the option of pleading guilty to a lesser offense.

Lockett called Dew and her brother as defense witnesses, but they invoked their Fifth Amendment rights and refused to testify. In the course of the defense presentation, Lockett's counsel informed the court, in the presence of the jury, that he believed Lockett was to be the next witness and requested a short recess. After the recess, Lockett's counsel told the judge that Lockett wished to testify but had decided to accept her mother's advice to remain silent, despite her counsel's warning that, if she followed that advice, she would have no

defense except the cross-examination of the State's witnesses. Thus, the defense did not introduce any evidence to rebut the prosecutor's case.

The court instructed the jury that, before it could find Lockett guilty, it had to find that she purposely had killed the pawnbroker while committing or attempting to commit aggravated robbery. The jury was further charged that one who

> "purposely aids, helps, associates himself or herself with another for the purpose of committing a crime is regarded as if he or she were the principal offender and is just as guilty as if the person performed every act constituting the offense. . . ."

Regarding the intent requirement, the court instructed:

> "A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise. . . .
>
> "If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide . . . . An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances."

The jury found Lockett guilty as charged.

Once a verdict of aggravated murder with specifications had been returned, the Ohio death penalty statute required the trial judge to impose a death sentence unless, after "considering the nature and circumstances of the offense" and Lockett's "history, character, and condition," he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she "was under duress, coercion, or strong provocation," or (3) the

offense was "primarily the product of [Lockett's] psychosis or mental deficiency." Ohio Rev. Code §§ 2929.03–2929.04 (B) (1975).

In accord with the Ohio statute, the trial judge requested a presentence report as well as psychiatric and psychological reports. The reports contained detailed information about Lockett's intelligence, character, and background. The psychiatric and psychological reports described her as a 21-year-old with low-average or average intelligence, and not suffering from a mental deficiency. One of the psychologists reported that "her prognosis for rehabilitation" if returned to society was favorable. The presentence report showed that Lockett had committed no major offenses although she had a record of several minor ones as a juvenile and two minor offenses as an adult. It also showed that she had once used heroin but was receiving treatment at a drug abuse clinic and seemed to be "on the road to success" as far as her drug problem was concerned. It concluded that Lockett suffered no psychosis and was not mentally deficient.[2]

After considering the reports and hearing argument on the penalty issue, the trial judge concluded that the offense had not been primarily the product of psychosis or mental deficiency. Without specifically addressing the other two statutory mitigating factors, the judge said that he had "no alternative, whether [he] like[d] the law or not" but to impose the death penalty. He then sentenced Lockett to death.

II

A

At the outset, we address Lockett's various challenges to the validity of her conviction. Her first contention is that the

[2] The presentence report also contained information about the robbery. It indicated that Dew had told the police that he, Parker, and Lockett's brother had planned the holdup. It also indicated that Parker had told the police that Lockett had not followed his order to keep the car running during the robbery and instead had gone to get something to eat.

prosecutor's repeated references in his closing remarks to the State's evidence as "unrefuted" and "uncontradicted" constituted a comment on her failure to testify and violated her Fifth and Fourteenth Amendment rights. See *Griffin* v. *California,* 380 U. S. 609, 615 (1965). We conclude, however, that the prosecutor's closing comments in this case did not violate constitutional prohibitions. Lockett's own counsel had clearly focused the jury's attention on her silence, first, by outlining her contemplated defense in his opening statement and, second, by stating to the court and jury near the close of the case, that Lockett would be the "next witness." When viewed against this background, it seems clear that the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand.

B

Lockett also contends that four prospective jurors were excluded from the venire in violation of her Sixth and Fourteenth Amendment rights under the principles established in *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968), and *Taylor* v. *Louisiana,* 419 U. S. 522, 528 (1975). We do not agree.

On *voir dire,* the prosecutor told the venire that there was a possibility that the death penalty might be imposed, but that the judge would make the final decision as to punishment. He then asked whether any of the prospective jurors were so opposed to capital punishment that "they could not sit, listen to the evidence, listen to the law, [and] make their determination solely upon the evidence and the law without considering the fact that capital punishment" might be imposed. Four of the venire responded affirmatively. The trial judge then addressed the following question to those four veniremen:

> "[D]o you feel that you could take an oath to well and truely [*sic*] try this case . . . and follow the law, or is

> your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"

Each of the four specifically stated twice that he or she would not "take the oath." They were excused.

In *Witherspoon*, persons generally opposed to capital punishment had been excluded for cause from the jury that convicted and sentenced the petitioner to death. We did not disturb the conviction but we held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U. S., at 522. We specifically noted, however, that nothing in our opinion prevented the execution of a death sentence when the veniremen excluded for cause make it "unmistakably clear . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Id.*, at 522–523, n. 21.

Each of the excluded veniremen in this case made it "unmistakably clear" that they could not be trusted to "abide by existing law" and "to follow conscientiously the instructions" of the trial judge. *Boulden* v. *Holman*, 394 U. S. 478, 484 (1969). They were thus properly excluded under *Witherspoon*, even assuming, *arguendo*, that *Witherspoon* provides a basis for attacking the conviction as well as the sentence in a capital case.

Nor was there any violation of the principles of *Taylor* v. *Louisiana*, *supra*. In *Taylor*, the Court invalidated a jury selection system that operated to exclude a "grossly disproportionate," 419 U. S., at 525, number of women from jury service thereby depriving the petitioner of a jury chosen from a "fair cross-section" of the community, *id.*, at 530. Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly

indicated an inability to follow the law and instructions of the trial judge.

C

Lockett's final attack on her conviction, as distinguished from her sentence, merits only brief attention. Specifically she contends that the Ohio Supreme Court's interpretation of the complicity provision of the statute under which she was convicted, Ohio Rev. Code Ann. § 2923.03 (A) (1975), was so unexpected that it deprived her of fair warning of the crime with which she was charged. The opinion of the Ohio Supreme Court belies this claim. It shows clearly that the construction given the statute by the Ohio court was consistent with both prior Ohio law and with the legislative history of the statute.[3] In such circumstances, any claim of inadequate notice under the Due Process Clause of the Fourteenth Amendment must be rejected.

III

Lockett challenges the constitutionality of Ohio's death penalty statute on a number of grounds. We find it necessary to consider only her contention that her death sentence is invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime. To address her contention from the proper perspective, it is helpful to review the developments in our recent cases where we have applied the Eighth and Fourteenth Amendments to death penalty statutes. We do not write on a "clean slate."

A

Prior to *Furman* v. *Georgia*, 408 U. S. 238 (1972), every State that authorized capital punishment had abandoned

[3] See 49 Ohio St. 2d 48, 58–62, 358 N. E. 2d 1062, 1070–1072 (1976); *id.*, at 69–70, 358 N. E. 2d, at 1076 (Stern, J., dissenting).

mandatory death penalties,[4] and instead permitted the jury unguided and unrestrained discretion regarding the imposition of the death penalty in a particular capital case.[5] Mandatory death penalties had proved unsatisfactory, as the plurality noted in *Woodson* v. *North Carolina*, 428 U. S. 280, 293 (1976), in part because juries, "with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."

This Court had never intimated prior to *Furman* that discretion in sentencing offended the Constitution. See *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937); *Williams* v. *New York*, 337 U. S. 241, 247 (1949); *Williams* v. *Oklahoma*, 358 U. S. 576, 585 (1959). As recently as *McGautha* v. *California*, 402 U. S. 183 (1971), the Court had specifically rejected the contention that discretion in imposing the death penalty violated the fundamental standards of fairness embodied in Fourteenth Amendment due process, *id.*, at 207–208, and had asserted that States were entitled to assume that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision." *Id.*, at 208.

The constitutional status of discretionary sentencing in capital cases changed abruptly, however, as a result of the separate opinions supporting the judgment in *Furman*. The question in *Furman* was whether "the imposition and carrying out of the death penalty [in the cases before the Court] constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U. S., at 239. Two Justices concluded that the Eighth Amendment prohibited the death penalty altogether and on that ground voted

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[4] See *Woodson* v. *North Carolina*, 428 U. S. 280, 291–292, and n. 25 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.).

[5] See *id.*, at 291–292; *McGautha* v. *California*, 402 U. S. 183, 200 n. 11 (1971).

to reverse the judgments sustaining the death penalties. *Id.*, at 305–306 (BRENNAN, J., concurring); *id.*, at 370–371 (MARSHALL, J., concurring). Three Justices were unwilling to hold the death penalty *per se* unconstitutional under the Eighth and Fourteenth Amendments, but voted to reverse the judgments on other grounds. In separate opinions, the three concluded that discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment because it was "pregnant with discrimination," *id.*, at 257 (Douglas, J., concurring), because it permitted the death penalty to be "wantonly" and "freakishly" imposed, *id.*, at 310 (STEWART, J., concurring), and because it imposed the death penalty with "great infrequency" and afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," *id.*, at 313 (WHITE, J., concurring). Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in *McGautha* became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in *Furman*. See *Gregg* v. *Georgia*, 428 U. S. 153, 195–196, n. 47 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.).

Predictably,[6] the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment.[7] Some States responded to what was thought to

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[6] See *Furman* v. *Georgia*, 408 U. S. 238, 403 (1972) (BURGER, C. J., dissenting).

[7] The limits on the consideration of mitigating factors in Ohio's death penalty statute which Lockett now attacks appear to have been a direct response to *Furman*. Prior to *Furman*, Ohio had begun to revise its system of capital sentencing. The Ohio House of Representatives had passed a bill abandoning the practice of unbridled sentencing discretion and instructing the sentencer to consider a list of aggravating and mitigating circumstances in determining whether to impose the death penalty. The list of mitigating circumstances permitted consideration of any circumstance

be the command of *Furman* by adopting mandatory death penalties for a limited category of specific crimes thus eliminating all discretion from the sentencing process in capital cases.[8] Other States attempted to continue the practice of individually assessing the culpability of each individual defendant convicted of a capital offense and, at the same time, to comply with *Furman*, by providing standards to guide the sentencing decision.[9]

Four years after *Furman*, we considered Eighth Amendment

"tending to mitigate the offense, though failing to establish a defense." See Sub. House Bill 511, 109th Ohio General Assembly § 2929.03 (C)(3), passed by the Ohio House on March 22, 1972; Lehman & Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 Cleve. St. L. Rev. 8, 10, 16 (1974).

Furman was announced during the Ohio Senate Judiciary Committee's consideration of the Ohio House bill. After *Furman*, the Committee decided to retain the death penalty but to eliminate much of the sentencing discretion permitted by the House bill. As a result, the Ohio Senate developed the current sentencing procedure which requires the imposition of the death penalty if one of seven specific aggravating circumstances and none of three specific mitigating circumstances is found to exist. Confronted with what reasonably would have appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after *Furman*, the sponsors of the Ohio House bill were not in a position to mount a strong opposition to the Senate's amendments, see Lehman & Norris, *supra*, at 18–22, and the statute under which Lockett was sentenced was enacted.

[8] See, *e. g.*, *Woodson*, *supra*, at 300 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Rockwell* v. *Superior Court*, 18 Cal. 3d 420, 446–448, 556 P. 2d 1101, 1116–1118 (1976) (Clark, J., concurring) (account of how California and other States enacted unconstitutional mandatory death penalties in response to *Furman*); *State* v. *Spence*, 367 A. 2d 983, 985–986 (Del. 1976) (Delaware Legislature and court interpreted *Furman* as requiring elimination of all sentencing discretion resulting in an unconstitutional statute); Liebman & Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor, 66 Geo. L. J. 757, 765 n. 43 (1978).

[9] See Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1690–1710 (1974).

issues posed by five of the post-*Furman* death penalty statutes.[10] Four Justices took the position that all five statutes complied with the Constitution; two Justices took the position that none of them complied. Hence, the disposition of each case varied according to the votes of three Justices who delivered a joint opinion in each of the five cases upholding the constitutionality of the statutes of Georgia, Florida, and Texas, and holding those of North Carolina and Louisiana unconstitutional.

The joint opinion reasoned that, to comply with *Furman*, sentencing procedures should not create "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner." *Gregg* v. *Georgia, supra,* at 188. In the view of the three Justices, however, *Furman* did not require that all sentencing discretion be eliminated, but only that it be "directed and limited," 428 U. S., at 189, so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not." *Id.,* at 188. The plurality concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson* v. *North Carolina,* 428 U. S., at 304, in order to ensure the reliability, under Eighth Amendment standards, of the determination that "death is the appropriate punishment in a specific case." *Id.,* at 305; see *Roberts* (*Harry*) v. *Louisiana,* 431 U. S. 633, 637 (1977); *Jurek* v. *Texas,* 428 U. S. 262, 271–272 (1976).

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[10] *Gregg* v. *Georgia,* 428 U. S. 153 (1976); *Proffitt* v. *Florida,* 428 U. S. 242 (1976); *Jurek* v. *Texas,* 428 U. S. 262 (1976); *Woodson* v. *North Carolina, supra;* and *Roberts* (*Stanislaus*) v. *Louisiana,* 428 U. S. 325 (1976).

In the last decade, many of the States have been obliged to revise their death penalty statutes in response to the various opinions supporting the judgments in *Furman* and *Gregg* and its companion cases. The signals from this Court have not, however, always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance.

B

With that obligation in mind we turn to Lockett's attack on the Ohio statute. Essentially she contends that the Eighth and Fourteenth Amendments require that the sentencer be given a full opportunity to consider mitigating circumstances in capital cases and that the Ohio statute does not comply with that requirement. She relies, in large part, on the plurality opinions in *Woodson, supra,* at 303–305, and *Roberts (Stanislaus)* v. *Louisiana,* 428 U. S. 325, 333–334 (1976), and the joint opinion in *Jurek, supra,* at 271–272, but she goes beyond them.

We begin by recognizing that the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country. See *Williams* v. *New York,* 337 U. S., at 247–248; *Pennsylvania ex rel. Sullivan* v. *Ashe,* 302 U. S., at 55. Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account. That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge. But the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty. See *ibid.; Williams* v. *New York, supra,* at 247–248; *Williams* v. *Oklahoma,* 358 U. S., at 585. And where sentencing discretion is granted, it generally

has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—*if not essential*—[to the] selection of an appropriate sentence . . . ." *Williams* v. *New York, supra,* at 247 (emphasis added).

The opinions of this Court going back many years in dealing with sentencing in capital cases have noted the strength of the basis for individualized sentencing. For example, Mr. Justice Black, writing for the Court in *Williams* v. *New York, supra,* at 247–248—a capital case—observed that the

> "whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial."

Ten years later, in *Williams* v. *Oklahoma, supra,* at 585, another capital case, the Court echoed Mr. Justice Black, stating that

> "[i]n discharging his duty of imposing a proper sentence, the sentencing judge is authorized, *if not required,* to consider all of the mitigating and aggravating circumstances involved in the crime." (Emphasis added.)

See also *Furman* v. *Georgia,* 408 U. S., at 245–246 (Douglas, J., concurring); *id.,* at 297–298 (BRENNAN, J., concurring); *id.,* at 339 (MARSHALL, J., concurring); *id.,* at 402–403 (BURGER, C. J., dissenting); *id.,* at 413 (BLACKMUN, J., dissenting); *McGautha* v. *California,* 402 U. S., at 197–203. Most would agree that "the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process." *Furman* v. *Georgia, supra,* at 402 (BURGER, C. J., dissenting).

Although legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases, the plurality opinion in *Woodson,* after

reviewing the historical repudiation of mandatory sentencing in capital cases, 428 U. S., at 289–298, concluded that

> "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304.

That declaration rested "on the predicate that the penalty of death is qualitatively different" from any other sentence. *Id.*, at 305. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." *Id.*, at 304. The plurality did not attempt to indicate, however, which facets of an offender or his offense it deemed "relevant" in capital sentencing or what degree of consideration of "relevant facets" it would require.

We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[11] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[12] We recognize that, in noncapital

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[11] We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder. See *Roberts (Harry) v. Louisiana*, 431 U. S. 633, 637 n. 5 (1977).

[12] Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.

cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.[13]

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

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[13] Sentencing in noncapital cases presents no comparable problems. We emphasize that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes.

C

The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases. Its constitutional infirmities can best be understood by comparing it with the statutes upheld in *Gregg*, *Proffitt*, and *Jurek*.

In upholding the Georgia statute in *Gregg*, JUSTICES STEWART, POWELL, and STEVENS noted that the statute permitted the jury "to consider any aggravating or mitigating circumstances," see *Gregg*, 428 U. S., at 206, and that the Georgia Supreme Court had approved "open and far-ranging argument" in presentence hearings, *id.*, at 203.[14] Although the Florida statute approved in *Proffitt* contained a list of mitigating factors, six Members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive.[15] *Jurek* involved a Texas statute which made no explicit reference to mitigating factors. 428 U. S., at 272. Rather, the jury was required to answer three

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[14] The statute provided that, in sentencing, the jury should consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law" in addition to 10 specified aggravating circumstances. See Ga. Code Ann. § 27.2534.1 (b) (Supp. 1975). MR. JUSTICE WHITE, who also voted to uphold the statute in an opinion joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, noted that the Georgia Legislature had decided to permit "the jury to dispense mercy on the basis of factors too intangible to write into a statute." *Gregg*, 428 U. S., at 222.

[15] The opinion of JUSTICES STEWART, POWELL, and STEVENS in *Proffitt* noted that the Florida statute "provides that '[a]ggravating circumstances shall be *limited* to . . . [eight specified factors]' " and that there was "no such limiting language introducing the list of statutory mitigating factors." 428 U. S., at 250 n. 8. MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, accepted the interpretation of the statute contained in the opinion of JUSTICES STEWART, POWELL, and STEVENS. See *id.*, at 260.

questions in the sentencing process, the second of which was "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc., Art. 37.071 (b) (Supp. 1975–1976); see 428 U. S., at 269. The statute survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show. *Id.*, at 272–273 (opinion of STEWART, POWELL, and STEVENS, JJ.), citing and quoting, *Jurek* v. *State*, 522 S. W. 2d 934, 939–940 (Tex. Crim. App. 1975). None of the statutes we sustained in *Gregg* and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

In this regard the statute now before us is significantly different. Once a defendant is found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty must be imposed unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the sentencing judge determines that at least one of the following mitigating circumstances is established by a preponderance of the evidence:

> "(1) The victim of the offense induced or facilitated it.
>
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." Ohio Rev. Code Ann. § 2929.04 (B) (1975).

The Ohio Supreme Court has concluded that there is no constitutional distinction between the statute approved in *Proffitt* and Ohio's statute, see *State* v. *Bayless*, 48 Ohio St. 2d 73, 86–87, 357 N. E. 2d 1035, 1045–1046 (1976), because the mitigating circumstances in Ohio's statute are "liberally construed in favor of the accused," *State* v. *Bell*, 48 Ohio St. 2d 270, 281, 358 N. E. 2d 556, 564 (1976); see *State* v. *Bayless*, *supra*, at 86, 357 N. E. 2d, at 1046, and because the sentencing judge or judges may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established, *State* v. *Bell*, *supra*, at 281, 358 N. E. 2d, at 564. But even under the Ohio court's construction of the statute, only the three factors specified in the statute can be considered in mitigation of the defendant's sentence. See, 48 Ohio St. 2d, at 281–282, 358 N. E. 2d, at 564–565; *State* v. *Bayless*, *supra*, at 87 n. 2, 357 N. E. 2d, at 1046 n. 2. We see, therefore, that once it is determined that the victim did not induce or facilitate the offense, that the defendant did not act under duress or coercion, and that the offense was not primarily the product of the defendant's mental deficiency, the Ohio statute mandates the sentence of death. The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision.

The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

Accordingly, the judgment under review is reversed to the

extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.[16]

So ordered.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

The pertinent provisions of the Ohio death penalty statute, Ohio Rev. Code Ann. (1975), are as follows:

> § 2929.03 Imposing sentence for a capital offense.
>
> (A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.
>
> (B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not

[16] In view of our holding that Lockett was not sentenced in accord with the Eighth Amendment, we need not address her contention that the death penalty is constitutionally disproportionate for one who has not been proved to have taken life, to have attempted to take life, or to have intended to take life, or her contention that the death penalty is disproportionate as applied to her in this case. Nor do we address her contentions that the Constitution requires that the death sentence be imposed by a jury; that the Ohio statutory procedures impermissibly burden the defendant's exercise of his rights to plead not guilty and to be tried by a jury; and that it violates the Constitution to require defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases.

guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a state-

ment, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such

condition is insufficient to establish the defense of insanity.

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join the Court's judgment, but only Parts I and II of its opinion. I, too, would reverse the judgment of the Supreme Court of Ohio insofar as it upheld the imposition of the death penalty on petitioner Sandra Lockett, but I would do so for a reason more limited than that which the plurality espouses, and for an additional reason not relied upon by the plurality.

I

The first reason is that, in my view, the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide. The Ohio capital penalty statute, together with that State's aiding-and-abetting statute, and its statutory definition of "purposefulness" as including reckless endangerment, allows for a particularly harsh application of the death penalty to any defendant who has aided or abetted the commission of an armed robbery in the course of which a person is killed, even though accidentally.[1] It might be that

[1] Ohio Rev. Code Ann. § 2903.01 (B) (1975) provides that "[n]o person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit . . . aggravated robbery," and § 2903.01 (C) states that one doing so is guilty of aggravated murder. Under § 2929.04 (A) (7), the commission of the same armed robbery serves as an aggravating specification to the murder and requires the imposition of the death penalty upon the principal offender unless the existence of one of the three permitted mitigating circumstances is established by a preponderance of the evidence. Sections 2923.03 (A) and (F) provide that an aider or abettor who acts "with the kind of culpability required for the commission

to inflict the death penalty in some such situations would skirt the limits of the Eighth Amendment proscription, incorporated in the Fourteenth Amendment, against gross disproportionality, but I doubt that the Court, in regard to murder, could easily define a convincing bright-line rule such as was used in regard to rape, *Coker* v. *Georgia*, 433 U. S. 584 (1977), to make workable a disproportionality approach.[2]

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of [the principal] offense" shall be "prosecuted and punished as if he were a principal offender." The finishing stroke is then delivered by Ohio's statutory definition of "purpose." Under § 2901.22 (A), "[a] person acts purposely when it is his specific intention to cause a certain result, or, *when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.*" (Emphasis added.)

In this case, as the three dissenting justices of the Ohio Supreme Court noted, 49 Ohio St. 2d 48, 68, 358 N. E. 2d 1062, 1075 (1976), the jury was instructed that Lockett could be found to have "purposely" aided a murder merely by taking part in a robbery in which the threat of force was to be employed. The jury was instructed: "If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide, even though the aider and abettor was not aware of the particular weapon used to accomplish the killing."

The State presented no testimony indicating any prior plan actually to fire the gun in the course of the robbery. The triggerman, Parker, testified that the gun discharged accidentally when the proprietor of the pawnshop grabbed at it. App. 50–51, 53.

[2] I do not find entirely convincing the disproportionality rule embraced by my Brother WHITE. The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results?

The more manageable alternative, in my view, is to follow a proceduralist tack, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing au-

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May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death," *post*, at 628, transforms the culpability of those defendants' actions?

Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?

The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite *mens rea*, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of *mens rea*.

Finally, I must question the data relied upon by my Brother WHITE in concluding, *post*, at 624, that only "extremely rare[ly]" has the death penalty been used when a defendant did not specifically intend the death of the victim. The representation made by petitioner Lockett, even if accepted uncritically, was merely that of 363 reported cases involving executions from 1954 to 1976, in 347 the defendant "personally committed a homicidal assault"—not that the defendant had actual intention to kill. App. to Brief for Petitioner 1b. Of contemporary death penalty statutes, my Brother WHITE concedes that approximately half permit the execution of persons who did not actually intend to cause death.

thority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's *mens rea*. That approach does not interfere with the States' individual statutory categories for assessing legal guilt, but merely requires that the sentencing authority be permitted to weigh any available evidence, adduced at trial or at the sentencing hearing, concerning the defendant's degree of participation in the homicide and the nature of his *mens rea* in regard to the commission of the homicidal act. A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force. Though heretofore I have been unwilling to interfere with the legislative judgment of the States in regard to capital-sentencing procedures, see *Furman* v. *Georgia*, 408 U. S. 238, 405 (1972) (dissenting opinion), adhered to in the 1976 cases, see my opinions in *Gregg* v. *Georgia*, 428 U. S. 153, 227; *Proffitt* v. *Florida*, 428 U. S. 242, 261; *Jurek* v. *Texas*, 428 U. S. 262, 279; *Woodson* v. *North Carolina*, 428 U. S. 280, 307; *Roberts* v. *Louisiana*, 428 U. S. 325, 363, this Court's judgment as to disproportionality in *Coker*, *supra*, in which I joined, and the unusual degree to which Ohio requires capital punishment of a mere aider and abettor in an armed felony resulting in a fatality even where *no* participant specifically intended the fatal use of a weapon, see n. 1, *supra*, provides a significant occasion for setting some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life.

This approach is not too far off the mark already used by many States in assessing the death penalty. Of 34 States that now have capital statutes, 18 specify that a minor degree of participation in a homicide may be considered by the sentenc-

ing authority, and, of the remaining 16 States, 9 allow consideration of any mitigating factor.[3]

II

The second ground on which reversal is required, in my view, is a *Jackson* issue. Although the plurality does not reach this issue, it is raised by petitioner, and I mention it against the possibility that any further revision of the Ohio death penalty statutes, prompted by the Court's decision today, contemplate as well, and cure, the *Jackson* deficiency.

In *United States* v. *Jackson*, 390 U. S. 570 (1968), the Court held that the capital-sentencing provision of the Federal Kidnaping Act was unconstitutional in that it needlessly burdened the defendant's exercise of the Sixth Amendment

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[3] The 18 state statutes specifically permitting consideration of a defendant's minor degree of involvement are Ala. Code, Tit. 13, § 13–11–7 (4) (1975); Ariz. Rev. Stat. Ann. § 13–454 (F)(3) (Supp. 1977); Ark. Stat. Ann. § 41–1304 (5) (1977); Cal. Penal Code Ann. § 190.3 (i) (West Supp. 1978); Fla. Stat. § 921.141 (6)(d) (Supp. 1978); Ind. Code § 35–50–2–9 (c)(4) (Supp. 1977); Ky. Rev. Stat. § 532.025 (2)(b)(5) (Supp. 1977); La. Code Crim. Proc., Art. 905.5 (g) (West Supp. 1978); Mo. Rev. Stat. § 565.012.3 (4) (Supp. 1978); Mont. Rev. Codes Ann. § 95–2206.9 (6) (Supp. 1977); Neb. Rev. Stat. § 29–2523 (2)(e) (1975); Nev. Rev. Stat. § 200.035 (4) (1977); N. C. Gen. Stat. § 15A–2000 (f)(4) (Supp. 1977), added by 1977 N. C. Sess. Laws, ch. 406; S. C. Code § 16–3–20 (C)(b)(4) (Supp. 1978); Tenn. Code Ann. § 39–2404 (j)(5) (Supp. 1977); Utah Code Ann. § 76–3–207 (1)(f) (Supp. 1977); Wash. Rev. Code § 9A.32.045 (2)(d) (Supp. 1977); Wyo. Stat. §§ 6–54.2 (c), (d), and (j)(iv) (Supp. 1977), added by 1977 Wyo. Sess. Laws, ch. 122.

The nine state statutes allowing consideration of any mitigating circumstance are Del. Code Ann., Tit. 11, § 4209 (c) (Supp. 1977); Ga. Code § 27–2534.1 (b) (1975); Idaho Code § 19–2515 (c) (Supp. 1977); Ill. Rev. Stat., ch. 38, § 9–1 (c) (Supp. 1978); Miss. Code Ann. § 97–3–21 (Supp. 1977), see *Jackson* v. *State*, 337 So. 2d 1242, 1254 (Miss. 1976); N. H. Rev. Stat. Ann. § 630:5 (II) (Supp. 1977); Okla. Stat., Tit. 21, § 701.10 (Supp. 1977); Tex. Code Crim. Proc. Ann., Art. 37.071 (b)(2) (Vernon Supp. 1978), see *Jurek* v. *Texas*, 428 U. S. 262, 272–273 (1976); Va. Code § 19.2–264.4 (B) (Supp. 1977).

right to trial by jury and the Fifth Amendment right to plead not guilty. The Act, 18 U. S. C. § 1201 (a) (1964 ed.), had provided that the death penalty could be imposed only "if the verdict of the jury shall so recommend," thus peculiarly insuring that any defendant who pleaded guilty, or who waived a jury trial in favor of a bench trial, could not be sentenced to death, and imposing the risk of death only on those who insisted on trial by jury.

The holding of *Jackson*, prohibiting imposition of the death penalty on a defendant who insists upon a jury trial, was thereafter limited to an extent by *Brady* v. *United States*, 397 U. S. 742 (1970), where the Court held that a pre-*Jackson* defendant who had pleaded guilty rather than go to trial was not entitled to withdraw his plea on grounds of involuntariness or coercion even if the plea had been encouraged by fear of the death penalty in a jury trial. Here, of course, petitioner insisted on her right to a jury trial, and thus falls on the *Jackson* side of any *Jackson-Brady* dichotomy.

Under Ohio Rule Crim. Proc. 11 (C)(3), the sentencing court has full discretion to prevent imposition of a capital sentence "in the interests of justice" *if* a defendant pleads guilty or no contest, but wholly lacks such discretion if the defendant goes to trial. The Rule states that if "the indictment contains one or more specifications [of aggravating circumstances], and a plea of guilty or no contest to the charge [of aggravated murder with specifications] is accepted, the court may dismiss the specifications and impose sentence [of life imprisonment] accordingly, in the interests of justice." Such a dismissal of aggravating specifications absolutely precludes imposition of the death penalty. There is *no* provision similar to Rule 11 (C)(4) permitting the trial court to dismiss aggravating specifications "in the interests of justice" where the defendant insists on his right to trial. Instead, as the Ohio Supreme Court noted in *State* v. *Weind*, 50 Ohio St. 2d 224, 227, 364 N. E. 2d 224, 228 (1977), vacated in part and remanded, *post*, p. 911, a defendant who pleads not guilty

"must rely on the court finding the presence of one of the [statutory] mitigating circumstances . . . to avoid the death sentence."

While it is true, as the Ohio Court noted in *Weind*, 50 Ohio St. 2d, at 229, 364 N. E. 2d, at 229, that there is always a possibility of a death sentence whether or not one pleads guilty, this does not change the fact that a defendant can plead not guilty only by enduring a semimandatory, rather than a purely discretionary, capital-sentencing provision. This disparity between a defendant's prospects under the two sentencing alternatives is, in my view, too great to survive under *Jackson*, and petitioner's death sentence thus should be vacated on that ground as well.

MR. JUSTICE MARSHALL, concurring in the judgment.

I continue to adhere to my view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth Amendment. See *Furman* v. *Georgia*, 408 U. S. 238, 314–374 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting). The cases that have come to this Court since its 1976 decisions permitting imposition of the death penalty have only persuaded me further of that conclusion. See, *e. g.*, *Gardner* v. *Florida*, 430 U. S. 349, 365 (1977) (MARSHALL, J., dissenting); *Coker* v. *Georgia*, 433 U. S. 584, 600–601 (1977) (MARSHALL, J., concurring in judgment); *Alford* v. *Florida*, 436 U. S. 935 (1978) (MARSHALL, J., dissenting from denial of certiorari). This case, as well, serves to reinforce my view.

When a death sentence is imposed under the circumstances presented here, I fail to understand how any of my Brethren—even those who believe that the death penalty is not wholly inconsistent with the Constitution—can disagree that it must be vacated. Under the Ohio death penalty statute, this 21-year-old Negro woman was sentenced to death for a killing that she did not actually commit or intend to commit. She was convicted under a theory of vicarious liability. The imposi-

tion of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition, *Weems* v. *United States*, 217 U. S. 349 (1910); it makes no distinction between a willful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs. See 49 Ohio St. 2d 48, 67, 358 N. E. 2d 1062, 1075 (1976) (dissenting opinion).

Permitting imposition of the death penalty solely on proof of felony murder, moreover, necessarily leads to the kind of "lightning bolt," "freakish," and "wanton" executions that persuaded other Members of the Court to join MR. JUSTICE BRENNAN and myself in *Furman* v. *Georgia*, *supra*, in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony-murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants. That the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the "evolving standards of decency," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion), embodied in the Eighth Amendment, by reference to state "legislative judgment," see *Gregg* v. *Georgia*, *supra*, at 175 (opinion of STEWART, POWELL, and STEVENS, JJ.).

As the plurality points out, petitioner was sentenced to death under a statutory scheme that precluded any effective consideration of her degree of involvement in the crime, her age, or her prospects for rehabilitation. Achieving the proper balance between clear guidelines that assure relative equality of treatment, and discretion to consider individual factors whose weight cannot always be preassigned, is no easy task in any sentencing system. Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon. The Ohio statute, with its blunderbuss, virtually mandatory approach to imposition of the death penalty for certain crimes,

wholly fails to recognize the unique individuality of every criminal defendant who comes before its courts. See *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633, 637 (1977) (*per curiam*); *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976).

The opinions announcing the judgment of the Court in *Gregg* v. *Georgia*, 428 U. S., at 188–198 (opinion of STEWART, POWELL, and STEVENS, JJ.), *Jurek* v. *Texas*, 428 U. S. 262, 271–276 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.), and *Proffitt* v. *Florida*, 428 U. S. 242, 259–260 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.), upheld the constitutionality of the death penalty, in the belief that a system providing sufficient guidance for the sentencing decisionmaker and adequate appellate review would assure "rationality," "consistency," and "proportionality" in the imposition of the death sentence. *Gregg* v. *Georgia, supra*, at 203; *Proffitt* v. *Florida, supra*, at 259; *Jurek* v. *Texas, supra*, at 276. That an Ohio trial court could impose the death penalty on petitioner under these facts, and that the Ohio Supreme Court on review could sustain it, cast strong doubt on the plurality's premise that appellate review in state systems is sufficient to avoid the wrongful and unfair imposition of this irrevocable penalty.

Accordingly, I join in the Court's judgment insofar as it affirms petitioner's conviction and vacates her death sentence. I do not, however, join in the Court's assumption that the death penalty may ever be imposed without violating the command of the Eighth Amendment that no "cruel and unusual punishments" be imposed.

MR. JUSTICE WHITE, concurring in part, dissenting in part, and concurring in the judgments of the Court.*

I concur in Parts I and II of the Court's opinion in *Lockett* v. *Ohio*, and Part I of the Court's opinion in *Bell* v. *Ohio, post*, p. 637 and in the judgments. I cannot, however, agree with

*[This opinion applies also to No. 76-6513, *Bell* v. *Ohio, post*, p. 637.]

Part III of the plurality opinion in *Lockett* and Part II of the plurality opinion in *Beli* and to that extent respectfully dissent.

I

The Court has now completed its about-face since *Furman* v. *Georgia*, 408 U. S. 238 (1972). *Furman* held that as a result of permitting the sentencer to exercise unfettered discretion to impose or not to impose the death penalty for murder, the penalty was then being imposed discriminatorily,[1] wantonly and freakishly,[2] and so infrequently[3] that any given death sentence was cruel and unusual. The Court began its retreat in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and *Roberts* (*Stanislaus*) v. *Louisiana*, 428 U. S. 325 (1976), where a plurality held that statutes which imposed mandatory death sentences even for first-degree murders were constitutionally invalid because the Eighth Amendment required that consideration be given by the sentencer to aspects of character of the individual offender and the circumstances of the particular offense in deciding whether to impose the punishment of death.[4] Today it is held, again through a plurality, that the sentencer may constitutionally impose the death penalty only as an exercise of his unguided discretion after being presented with all circumstances which the defendant might believe to be conceivably relevant to the appropriateness of the penalty for the individual offender.[5]

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[1] See *Furman* v. *Georgia*, 408 U. S., at 240 (Douglas, J., concurring).

[2] See *id.*, at 306 (STEWART, J., concurring).

[3] See *id.*, at 310 (WHITE, J., concurring).

[4] The Court took a further step along this path in *Roberts* (*Harry*) v. *Louisiana*, 431 U. S. 633 (1977), which held that the imposition of a mandatory death sentence even upon one convicted of the first-degree murder of a police officer engaged in the performance of his duties constituted cruel and unusual punishment.

[5] The plurality's general endorsement of individualized sentencing as representing enlightened public policy even apart from the Eighth Amend-

With all due respect, I dissent. I continue to be of the view, for the reasons set forth in my dissenting opinion in *Roberts, supra,* at 337, that it does not violate the Eighth Amendment for a State to impose the death penalty on a mandatory basis when the defendant has been found guilty beyond a reasonable doubt of committing a deliberate, unjustified killing. Moreover, I greatly fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that "its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman* v. *Georgia, supra,* at 312 (WHITE, J., concurring). By requiring as a matter of constitutional law that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances, the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime. This invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration. I decline to extend *Woodson* and *Roberts* in this respect.

It also seems to me that the plurality strains very hard and unsuccessfully to avoid eviscerating the handiwork in *Proffitt* v. *Florida,* 428 U. S. 242 (1976), and *Jurek* v. *Texas,* 428 U. S. 262 (1976); and surely it calls into question any other death penalty statute that permits only a limited num-

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ment context, *ante,* at 602–603, is not only questionable but also highly inappropriate in light of the fact that Congress, after detailed study of the matter, is currently giving serious consideration to legislation adopting the view that the goals of the criminal law are best achieved by a system of sentencing which narrowly limits the discretion of the sentencer. See S. 1437, 95th Cong., 2d Sess. (approved by the Senate on Jan. 30, 1978).

ber of mitigating circumstances to be placed before the sentencing authority or to be used in its deliberations.

II

I nevertheless concur in the judgments of the Court reversing the imposition of the death sentences because I agree with the contention of the petitioners, ignored by the plurality, that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.

It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in relation to the crime for which it is imposed. A punishment is disproportionate "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (opinion of WHITE, J.). Because it has been extremely rare that the death penalty has been imposed upon those who were not found to have intended the death of the victim, the punishment of death violates both tests under the circumstances present here.

According to the factual submissions before this Court, out of 363 reported executions for homicide since 1954 for which facts are available only eight clearly involved individuals who did not personally commit the murder.[6] Moreover, at least some of these eight executions involved individuals who in-

[6] The study is based upon reported appellate opinions. There were eight additional cases in which the facts were not reported in sufficient detail to permit a determination as to the status of the executed person. I recognize that because of the absence of reported appellate opinions for some cases this study does not include all executions within the relevant time period. There is no reason whatsoever to suppose, however, that the statistics relevant to these executions would alter the conclusions to be drawn from those included in the study.

tended to cause the death of the victim.[7] Furthermore, the last such execution occurred in 1955. In contrast, there have been 72 executions for rape in the United States since 1954.[8]

I recognize that approximately half of the States have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death. The ultimate judgment of the American people concerning the imposition of the death penalty upon such defendants, however, is revealed not only by the content of statutes and by the imposition of capital sentences but also by the frequency with which society is prepared actually to inflict the punishment of death. See *Furman* v. *Georgia*, 408 U. S. 238 (1972). It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime.

The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders—and that debate rages on—its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful. Moreover, whatever legitimate purposes the imposition of death upon those who do not intend to cause death might serve if inflicted with any regularity is surely dissipated by society's apparent unwillingness to impose it upon other than an occasional and erratic basis. See *id.*, at 310 (WHITE, J., concurring).

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[7] In two of these cases the executed person arranged for another to commit the murder for him. I realize that it may be conceivable that a few of the "triggermen" actually executed lacked an intent to kill. But such cases will of necessity be rare.

[8] U. S. Department of Justice, Law Enforcement Assistance Administration, National Prisoner Statistics Bulletin No. SD–NPS–CP–3, Capital Punishment 1974, pp. 16–17 (Nov. 1975).

Under those circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable or, indeed, any perceptible goals of punishment.

This is not to question, of course, that those who engage in serious criminal conduct which poses a substantial risk of violence, as did the present petitioners, deserve serious punishment regardless of whether or not they possess a purpose to take life. And the fact that death results, even unintentionally, from a criminal venture need not and frequently is not regarded by society as irrelevant to the appropriate degree of punishment. But society has made a judgment, which has deep roots in the history of the criminal law, see *United States* v. *United States Gypsum Co., ante,* p. 422, distinguishing at least for purpose of the imposition of the death penalty between the culpability of those who acted with and those who acted without a purpose to destroy human life.

Both of these petitioners were sentenced to death without a finding at any stage of the proceeding that they intended the death of those who were killed as a result of their criminal conduct. In *Lockett* v. *Ohio,* the trial judge instructed the jury as follows:

> "A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise. . . .
>
> "If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide . . . . An intent to kill by an aider and abettor may be

> found to exist beyond a reasonable doubt under such circumstances."

On appeal, the Ohio Supreme Court held that where "it might be reasonably expected by all the participants that the victim's life would be endangered by the manner and means of performing the act conspired . . . participants [are] bound by all the consequences naturally and probably arising from the furtherance of the conspiracy to commit the robbery." 49 Ohio St. 2d 48, 62, 358 N. E. 2d 1062, 1072 (1976). It is thus clear that under Ohio law a defendant may be convicted of aggravated murder with aggravating specifications and sentenced to death without a finding that he intended death to result but only that he engaged in criminal conduct which posed a substantial risk of death to others. Moreover, it appears that nowhere during either the trial or sentencing process was any finding made that Lockett intended that death be inflicted in connection with the robbery. The petitioner in *Bell* v. *Ohio, post,* p. 637, was tried before a three-judge panel. Again, however, no findings were made either during the trial or sentencing stage of the process that Bell intended the death of the victim which resulted from the criminal conduct in which he was engaged.

Of course, the facts of both of these cases might well permit the inference that the petitioners did in fact intend the death of the victims. But there is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill as Ohio has done. See *United States* v. *United States Gypsum Co., ante,* p. 422. Indeed, the type of conduct which Ohio would punish by death requires at most the degree of *mens rea* defined by the ALI Model Penal Code (1962) as recklessness: conduct undertaken with knowledge that death is likely to

follow.[9] Since I would hold that death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death, these sentences must be set aside.[10]

MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I join Parts I and II of THE CHIEF JUSTICE's opinion for the Court, but am unable to join Part III of his opinion or in the judgment of reversal.

I

Whether out of a sense of judicial responsibility or a less altruistic sense of futility, there are undoubtedly circumstances which require a Member of this Court "to bow to the authority" of an earlier case despite his "original and continuing belief that the decision was constitutionally wrong." *Burns* v. *Richardson*, 384 U. S. 73, 98 (1966) (Harlan, J., concurring in result). See also *id.*, at 99 (STEWART, J., concurring in judgment). The Court has most assuredly not adopted the dissenting views which I expressed in the previous capital

[9] Section 2.02 (2)(c) provides:

"A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

In contrast, § 2.02 (2)(a) provides:

"A person acts purposely with respect to a material element of an offense when:

"(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result . . . ."

[10] I find it unnecessary to address other constitutional challenges to the death sentences imposed in these cases.

punishment cases, see *Woodson* v. *North Carolina,* 428 U. S. 280, 308 (1976), and *Furman* v. *Georgia,* 408 U. S. 238, 465 (1972). It has just as surely not cloven to a principled doctrine either holding the infliction of the death penalty to be unconstitutional *per se* or clearly and understandably stating the terms under which the Eighth and Fourteenth Amendments permit the death penalty to be imposed. Instead, as I believe both the opinion of THE CHIEF JUSTICE and the opinion of my Brother WHITE seem to concede, the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed.

THE CHIEF JUSTICE states: "We do not write on a 'clean slate,' " *ante,* at 597. But it can scarcely be maintained that today's decision is the logical application of a coherent doctrine first espoused by the opinions leading to the Court's judgment in *Furman,* and later elaborated in the *Woodson* series of cases decided two Terms ago. Indeed, it cannot even be responsibly maintained that it is a principled application of the plurality and lead opinions in the *Woodson* series of cases, without regard to *Furman.* The opinion strives manfully to appear as a logical exegesis of those opinions, but I believe that it fails in the effort. We are now told, in effect, that in order to impose a death sentence the judge or jury must receive in evidence whatever the defense attorney wishes them to hear. I do not think THE CHIEF JUSTICE's effort to trace this quite novel constitutional principle back to the plurality and lead opinions in the *Woodson* cases succeeds.

As the opinion admits, *ante,* at 606 n. 14, the statute upheld in *Gregg* v. *Georgia,* 428 U. S. 153 (1976), permitted the sentencing authority to consider only those mitigating circumstances " 'authorized by law.' " *Id.,* at 164 (opinion of STEWART, POWELL, and STEVENS, JJ.) (citation omitted). Today's opinion goes on to say: "Although the Florida statute

approved in *Proffitt* [v. *Florida*, 428 U. S. 242 (1976)] contained a list of mitigating factors, six Members of this Court assumed . . . that the range of mitigating factors listed in the statute was not exclusive." *Ante*, at 606, and n. 15, citing *Proffitt, supra*, at 250 n. 8, 260. The footnote referred to discussed whether the Florida court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. The reference to the absence of limiting language with respect to the list of statutory mitigating factors was employed to emphasize the different statutory treatment of aggravating circumstances. Indeed, only one page later the joint opinion stated: "The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed." 428 U. S., at 251. The other *Proffitt* opinion referred to in today's opinion, the dissenting opinion of MR. JUSTICE WHITE, *id.*, at 260, said of mitigating circumstances: "[A]lthough the statutory aggravating and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered."

The opinion's effort to find support for today's rule in our opinions in *Jurek* v. *Texas*, 428 U. S. 262 (1976), is equally strained. The lead opinion there read the opinion of the Texas Court of Criminal Appeals to interpret the statute "so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show," *id.*, at 272, and went on to quote several specified types of mitigating circumstances which were mentioned in the Texas court's opinion. I think it clear from this context that the term "mitigating circumstances" was *not* so broad as to encompass any evidence which the defense attorney saw fit to present to a judge or jury.

It seems to me indisputably clear from today's opinion that,

while we may not be writing on a clean slate, the Court is scarcely faithful to what has been written before. Rather, it makes a third distinct effort to address the same question, an effort which derives little support from any of the various opinions in *Furman* or from the prevailing opinions in the *Woodson* cases. As a practical matter, I doubt that today's opinion will make a great deal of difference in the manner in which trials in capital cases are conducted, since I would suspect that it has been the practice of most trial judges to permit a defendant to offer virtually any sort of evidence in his own defense as he wished. But as my Brother WHITE points out in his dissent, the theme of today's opinion, far from supporting those views expressed in *Furman* which did appear to be carried over to the *Woodson* cases, tends to undercut those views. If a defendant as a matter of constitutional law is to be permitted to offer as evidence in the sentencing hearing any fact, however bizarre, which he wishes, even though the most sympathetically disposed trial judge could conceive of no basis upon which the jury might take it into account in imposing a sentence, the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a "mitigating circumstance," it will not guide sentencing discretion but will totally unleash it. It thus appears that the evil described by the *Woodson* plurality—that mandatory capital sentencing "papered over the problem of unguided and unchecked jury discretion," 428 U. S., at 302—was in truth not the unchecked discretion, but a system which "papered over" its exercise rather than spreading it on the record.

I did not, either at the time of the *Furman* decision or the decision in the *Woodson* cases, agree with the views expressed in *Furman* which I thought the lead opinions in the *Woodson*

cases sought to carry over into those opinions. I do, however, agree with the statements as to institutional responsibility contained in the separate opinions in *Burns* v. *Richardson*, 384 U. S. 73 (1966), and I trust that I am not insensitive to THE CHIEF JUSTICE's expressed concern in his opinion that "[t]he States now deserve the clearest guidance that the Court can provide" on capital punishment. *Ante*, at 602. Given the posture of my colleagues in this case, however, there does not seem to me to be any way in which I can assist in the discharge of that obligation. I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years.

A majority of the Court has yet to endorse the course taken by today's plurality in using the Eighth Amendment as a device for importing into the trial of capital cases extremely stringent procedural restraints. The last opinion on that subject to command a majority of this Court was that of Mr. Justice Harlan in *McGautha* v. *California*, 402 U. S. 183 (1971), in which he spoke for the Court in these words:

> "It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. See *Spencer* v. *Texas*, 385 U. S. 554 (1967). The Constitution requires no more than that trials be

fairly conducted and that guaranteed rights of defendants be scrupulously respected." *Id.*, at 221.

I continue to view *McGautha* as a correct exposition of the limits of our authority to revise state criminal procedures in capital cases under the Eighth and Fourteenth Amendments. Sandra Lockett was fairly tried, and was found guilty of aggravated murder. I do not think Ohio was required to receive any sort of mitigating evidence which an accused or his lawyer wishes to offer, and therefore I disagree with Part III of the plurality's opinion.

II

Because I reject the primary contentions offered by petitioner, I must also address her other arguments, with which the Court does not wish to deal, in order to conclude that the State may impose the death penalty. Two of petitioner's objections can be dismissed with little comment. First, she complains that the Ohio procedure does not permit jury participation in the sentencing process. As the lead opinion pointed out in *Proffitt*, 428 U. S., at 252, this Court "has never suggested that jury sentencing is constitutionally required." No majority of this Court has ever reached a contrary conclusion, and I would not do so today. Second, she contends that the State should be required to prove the absence of mitigating factors beyond a reasonable doubt. Because I continue to believe that the Constitution is not offended by the State's refusal to consider mitigating factors at all, there can be no infirmity in shifting the burden of persuasion to the defendant when it chooses to consider them.

Petitioner also presents two arguments based on *United States* v. *Jackson*, 390 U. S. 570 (1968), in which the Court held that the imposition of the death penalty under the Federal Kidnaping Act, 18 U. S. C. § 1201 (a) (1964 ed.), was unconstitutional because it could only be imposed where the defendant exercised his right to trial by jury. First, petitioner

attacks the provision of the statute requiring three judges, rather than one, to hear the case when a defendant chooses to be tried by the court rather than the jury. She contends that the three judges are less likely to impose the death penalty than would be the single judge who determines sentence in the case of a jury trial. To that extent, she argues, the exercise of the right to a jury trial is discouraged because of a fear of a higher probability of the imposition of the death penalty. This argument cannot be supported. There is simply no reason to conclude that three judges are less likely than one to impose the death sentence on a convicted murderer. At the same time, it is at least equally plausible that the three judges would be less likely than a jury to convict in the first instance. Thus, at the time when an accused defendant must choose between a trial before the jury and a trial to the court, it simply cannot be said which is more likely to result in the imposition of death. Since both procedures are sufficiently fair to satisfy the Constitution, I see no infirmity in requiring petitioner to choose which she prefers.

Second, petitioner complains that the trial court has the authority to dismiss the specifications of aggravating circumstances, thus precluding the imposition of the death penalty, only when a defendant pleads guilty or no contest. She contends that this limitation upon the availability of judicial mercy unfairly penalizes her right to plead not guilty. While *Jackson* may offer some support for this contention, it certainly does not compel its acceptance. In *Jackson*, the defendant could have been executed if he exercised his right to a jury trial, but could not have been executed if he waived it. In Ohio, a defendant is subject to possible execution whether or not he pleads guilty. Furthermore, if he chooses to plead guilty, he is not subject to possible acquittal. Under such circumstances, it is difficult to imagine that any defendant will be deterred from exercising his right to go to trial. Indeed, petitioner was not so deterred, and respondent reports that

no one in petitioner's county has ever pleaded guilty to capital murder. Brief for Respondent 36. The mere fact that petitioner was required to choose hardly amounts to a constitutional violation. In *McGautha, supra,* at 212–213, the Court explained an earlier decision, *Simmons* v. *United States,* 390 U. S. 377 (1968), in which it had invalidated a conviction because the defendant had been required to forgo his Fifth Amendment privilege against self-incrimination to protect a Fourth Amendment claim. Here, petitioner's assertion of her right to go to trial would have deprived her only of a statutory possibility of mercy, not of constitutional dimensions, enjoyed by other defendants in Ohio. Nothing in *Jackson* suggests that such a choice is forbidden by the Fourteenth Amendment.

I finally reject the proposition urged by my Brother WHITE in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is a fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim. As my Brother WHITE concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." *Ante,* at 625. Centuries of common-law doctrine establishing the felony-murder doctrine, dealing with the relationship between aiders and abettors and principals, would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against

cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

Since all of petitioner's claims appear to me to be without merit, I would affirm the judgment of the Supreme Court of Ohio.

BELL *v.* OHIO

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 76–6513. Argued January 17, 1978—Decided July 3, 1978

Petitioner, whose conviction of aggravated murder with a specification that it occurred during a kidnaping and death sentence were affirmed by the Ohio Supreme Court, contends that the Ohio death penalty statute (see *Lockett* v. *Ohio, ante,* p. 586) violated his rights under the Eighth and Fourteenth Amendments because it prevented the sentencing judge from considering the particular circumstances of his crime and aspects of his character and record as mitigating factors. *Held:* The judgment is reversed insofar as it upholds the death penalty, and the case is remanded. Pp. 642–643; 624–628; 643; 643–644.

48 Ohio St. 2d 270, 358 N. E. 2d 556, reversed in part and remanded.

MR. CHIEF JUSTICE BURGER, joined by MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, concluded:

1. "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers." *Lockett* v. *Ohio, ante,* at 604. P. 642.

2. "The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors" that is required by the Eighth and Fourteenth Amendments. *Lockett* v. *Ohio, ante,* at 606. P. 642.

MR. JUSTICE WHITE concluded that petitioner's death sentence should be vacated on the ground that the Ohio death penalty statute permits a defendant convicted of aggravated murder with specifications to be sentenced to death, as petitioner was in this case, without a finding that he intended death to result. Pp. 624–628.

MR. JUSTICE MARSHALL, being of the view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, concurred in the judgment. Pp. 643–644.

MR. JUSTICE BLACKMUN concluded that petitioner's death sentence should be vacated on the ground that the Ohio death penalty statute is deficient in regard to petitioner, who was charged as an aider and abettor

in a murder, in failing to allow consideration of the degree of petitioner's involvement, and the character of his *mens rea*, in the crime. P. 643.

BURGER, C. J., announced the Court's judgment and delivered an opinion, in Part I of which STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Part II of which STEWART, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 643. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 643. WHITE, J., filed an opinion concurring in part, concurring in the judgment, and dissenting in part, *ante*, p. 621. REHNQUIST, J., filed a dissenting statement, *post*, p. 644. BRENNAN, J., took no part in the consideration or decision of the case.

H. Fred Hoefle argued the cause for petitioner. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Joel Berger, David E. Kendall,* and *Anthony G. Amsterdam.*

Leonard Kirschner argued the cause for respondent. With him on the brief were *Simon L. Leis, Jr., Fred J. Cartolano, William P. Whalen, Jr.,* and *Claude N. Crowe.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court with respect to the facts of the case and the proceedings below (Part I), together with an opinion (Part II), in which MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS joined, on the constitutionality of the statute under which petitioner was sentenced to death, and announced the judgment of the Court.

We granted certiorari in this case to consider whether the imposition of the death penalty upon Willie Lee Bell pursuant to Ohio Rev. Code Ann. §§ 2929.01–2929.04 (1975) violated the Eighth and Fourteenth Amendments. 433 U. S. 907 (1977).

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*Briefs of *amici curiae* were filed by *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, and *William E. James*, Senior Assistant Attorney General, for the State of California; and by *Lawrence Herman, Nelson G. Karl,* and *Robert P. App* for the American Civil Liberties Union of Ohio Foundation, Inc.

I

Bell was convicted of aggravated murder with the specification that the murder occurred in the course of a kidnaping. He was sentenced to death.

On October 16, 1974, Bell, who was then 16 years old, met a friend, Samuel Hall, who was then 18, at a youth center in Cincinnati, Ohio. They left the center and went to Hall's home where Hall borrowed a car and proceeded to drive Bell around the area. They followed a car driven by 64-year-old Julius Graber into a parking garage, and Hall, armed with a "sawed off" shotgun, forced Graber to surrender his car keys. Graber was placed, unharmed, into the trunk of his own car. Hall then drove Graber's car and Bell followed in Hall's car to the latter's home. There, Bell got into Graber's car with Hall and, following Hall's directions, drove to a nearby cemetery.

A resident of an apartment near the cemetery saw Graber's car parked on the service road of the cemetery with its parking lights on. He heard two car doors close and then a voice screaming, "Don't shoot me, don't shoot me," followed by two shots. He saw someone return to Graber's car and slide from the passenger's seat into the driver's seat. After observing Graber's car proceed away—with lights off—he called the police.

The police found Graber lying face down in the cemetery with a massive wound on the back of his head and another on his right cheek. He died en route to the hospital.

Although Bell did not testify at his trial, he gave his version of the killing to the police after his arrest in a statement that was recorded and introduced at trial. Bell denied any intention to participate in a killing. He said that after he and Hall had parked in the cemetery, he had asked Hall what they were going to do next, and that Hall had replied: "We'll see. Give me the keys." Hall then, according to Bell, released Graber from the trunk and marched him into a forested area to the rear of the cemetery out of Bell's sight. Bell then heard Graber

pleading for his life and heard a gunshot. According to Bell, Hall then came back to the car, reloaded the gun, and returned to the wooded area. Bell said he heard a second shot and Hall returned to the car and drove to Dayton, where they spent the night with friends of Hall.

The next day, with Bell driving Graber's car, Bell and Hall stopped at a service station in Dayton. Hall used the shotgun to obtain the keys to the attendant's car, and forced the attendant into the trunk. Hall then drove the attendant's car away from the station with Bell following in Graber's car. A patrolman stopped the car that Hall was driving for a defective muffler and discovered the attendant in the trunk. Bell drove past Hall and the officer and returned to Cincinnati where he abandoned Graber's car.

After his arrest and indictment, Bell waived his right to a trial by jury and requested a trial by a three-judge panel. The panel unanimously found him guilty of aggravated murder and of the specification that the murder occurred in the course of a kidnaping. That offense required the death penalty under Ohio Rev. Code Ann. §§ 2929.03, 2929.04 (1975), which is set forth in the Appendix to our opinion in *Lockett* v. *Ohio*, *ante*, p. 609, decided today.

Pursuant to Ohio law, the panel ordered a presentence investigation and psychiatric examination of Bell. The psychiatrists' report was directed specifically at the three mitigating factors and concluded that none of them were present. It also noted, however, that Bell claimed not to have been aware of what Hall was doing when he shot Graber.

The presentence report contained detailed information about the offense and about Bell's background, intelligence, prior offenses, character, and habits. It noted that Hall had accused Bell of actually firing the shotgun at Graber. In addition to describing Bell as having "low average or dull normal intellectual capability," it noted that Bell had been cited in juvenile court for a series of prior offenses and had allegedly been using mescaline on the night of the offense.

The three-judge panel permitted both sides the opportunity to introduce evidence and make arguments regarding the proper penalty. Bell testified that he had been under the influence of drugs virtually every day for three years prior to his arrest and on the night of the killing. He also said that he had viewed Hall as a "big brother" and had followed Hall's instructions because he had been "scared." Several of Bell's teachers testified that Bell had a drug problem and was emotionally unstable and immature for his age.

The defense argued that Bell had acted out of fear and coercion and that the offense was due to Bell's mental deficiency. In support of his contention that Bell was mentally deficient, defense counsel argued that Bell's minority established mental deficiency as a matter of law; he also argued that Bell was mentally deficient compared to other teenagers because of his drug problem and emotional instability and that Bell's mental deficiency contributed to his passive part in the crime.

Prior to sentencing, Bell moved that the Ohio death penalty be declared unconstitutional under the Eighth and Fourteenth Amendments, contending that the Ohio death penalty statute, which had been enacted after *Furman* v. *Georgia*, 408 U. S. 238 (1972), severely limited the factors that would support an argument for mercy. Bell contended that his youth, the fact that he cooperated with the police, and the lack of proof that he had participated in the actual killing strongly supported an argument for a penalty less than death in this case. He also contended that Ohio's post-*Furman* death penalty statute precluded him from requesting a lesser sentence on the basis of those factors.

After considering the presentence and psychiatric reports as well as other evidence and the arguments of counsel, the panel concluded that none of the mitigating circumstances defined by the Ohio statute had been established. Accordingly, Bell was sentenced to death.

In the Ohio Supreme Court, Bell unsuccessfully renewed his

contention that the Ohio death penalty violated the Eighth and Fourteenth Amendments. He also contended, among other things, that the evidence was insufficient to sustain his conviction for aggravated murder because there was no proof that he had intended to kill or that he had aided and abetted Hall with the intent that Graber be killed. That court rejected these arguments and held that the evidence that Bell had aided and abetted was sufficient to sustain the conviction because, under Ohio law, an aider and abettor could be prosecuted and punished as if he were the principal offender. Alternatively, the court concluded that the trial panel might have reasonably concluded that Bell either committed or actively assisted in the murder.

II

Bell contends that the Ohio death penalty statute violated his rights under the Eighth and Fourteenth Amendments because it prevented the sentencing judges from considering the particular circumstances of his crime and aspects of his character and record as mitigating factors. For the reasons stated in Part III of our opinion in *Lockett* v. *Ohio, ante,* at 597–609, we have concluded that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers." *Ante,* at 604. We also concluded that "[t]he Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors," *ante,* at 606, that is required by the Eighth and Fourteenth Amendments. We therefore agree with Bell's contention.*

*In view of our conclusion that Bell's death sentence cannot stand due to the Ohio statute's limits on the consideration of mitigating circumstances, we do not address (a) Bell's contention that the death penalty is disproportionate as applied in this case or (b) his contentions that the Ohio capital sentencing procedure violates the Eighth and Fourteenth

Accordingly, the judgment of the Ohio Supreme Court is reversed to the extent that it upholds the imposition of the death penalty, and the case is remanded for further proceedings.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

[For opinion of MR. JUSTICE WHITE, concurring in part, dissenting in part, and concurring in the judgment, see *ante*, p. 621.]

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Part I of the Court's opinion and concur in the judgment. In accord with my views stated separately in *Lockett* v. *Ohio*, *ante*, p. 613, I would reverse the judgment of the Ohio Supreme Court insofar as it upheld the imposition of the death penalty on petitioner Bell. Petitioner was charged, *inter alia*, as an aider and abettor in the murder of Julius Graber, and the trial court's judgment was sustained on that basis by the Ohio Supreme Court. 48 Ohio St. 2d 270, 278, 358 N. E. 2d 556, 563 (1976). Accordingly, I would find the Ohio capital penalty statute deficient in failing to allow consideration of the degree of petitioner's involvement, and the character of his *mens rea*, in the crime.

MR. JUSTICE MARSHALL, concurring in the judgment.

I continue to believe that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by

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Amendments because of an alleged lack of meaningful appellate review, because the jury does not participate in sentencing, and because the defendant must bear the risk of nonpersuasion as to the existence of mitigating factors. Nor do we reach Bell's contention that the procedure under which he was tried and sentenced infringed his rights under the Sixth and Fourteenth Amendments. Our grant of certiorari in this case was limited to Eighth and Fourteenth Amendment issues. See 433 U. S. 907 (1977).

the Eighth and Fourteenth Amendments, *Furman* v. *Georgia*, 408 U. S. 238, 314–374 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), and thus disagree with the Court's assumption to the contrary. See *Lockett* v. *Ohio*, *ante*, p. 619 (MARSHALL, J., concurring in judgment). I join in the Court's judgment insofar as it requires that petitioner's death sentence be vacated.

MR. JUSTICE REHNQUIST, dissenting.

For the reasons stated in my concurring and dissenting opinion in *Lockett* v. *Ohio*, *ante*, p. 628, I would affirm the judgment of the Supreme Court of Ohio in this case. I therefore dissent from the Court's judgment reversing it.

Syllabus

CALIFORNIA ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-285. Argued March 28, 1978—Decided July 3, 1978

The United States Bureau of Reclamation applied to the California State Water Resources Control Board for a permit to appropriate water that would be impounded by the New Melones Dam, a unit of the California Central Valley Project. Congress specifically directed that the Dam be constructed and operated pursuant to the Reclamation Act of 1902, which established a program for federal construction and operation of reclamation projects to irrigate arid western land. Section 8 of that Act provides that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, . . . and the Secretary of the Interior in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . ." After lengthy hearings, the Board, having found that unappropriated water was available for the project during certain times of the year, approved the Bureau's application, but attached 25 conditions to the permit (the most important of which prohibited full impoundment until the Bureau was able to show a specific plan for use of the water) which the Board concluded were necessary to meet California's statutory water appropriation requirements. The United States then brought this action against petitioners (the State, the Board, and its members) seeking a declaratory judgment that the United States may impound whatever unappropriated water is necessary for a federal reclamation project without complying with state law. The District Court held that, as a matter of comity, the United States must apply to the State for an appropriation permit, but that the State must issue the permit without conditions if there is sufficient unappropriated water. The Court of Appeals affirmed, but held that § 8, rather than comity, requires the United States to apply for a permit. *Held:*

1. Under the clear language of § 8 and in light of its legislative history, a State may impose any condition on "control, appropriation, use or distribution of water" in a federal reclamation project that is not inconsistent with clear congressional directives respecting the project. To the extent that petitioners would be prevented by dicta that may

point to a contrary conclusion in *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275, *City of Fresno* v. *California*, 372 U. S. 627, and *Arizona* v. *California*, 373 U. S. 546, from imposing conditions in this case that are not inconsistent with congressional directives authorizing the project in question, those dicta are disavowed. Pp. 653–679.

2. Whether the conditions imposed by the Board in this case are inconsistent with congressional directives as to the New Melones Dam and issues involving the consistency of the conditions remain to be resolved. P. 679.

558 F. 2d 1347, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 679.

Roderick Walston, Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *Evelle J. Younger*, Attorney General, *R. H. Connett*, Assistant Attorney General, and *Richard C. Jacobs*, Deputy Attorney General.

Deputy Solicitor General Barnett argued the cause for the United States. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Sagalkin, Sara Sun Beale, Peter R. Steenland*, and *Carl Strass*.*

*A brief of *amici curiae* urging reversal was filed by officials for their respective States as follows: *Bruce E. Babbitt*, Attorney General of Arizona, and *Ralph E. Hunsaker; J. D. MacFarlane*, Attorney General of Colorado, and *David W. Robbins*, Deputy Attorney General; *Wayne L. Kidwell*, Attorney General of Idaho; *Curt T. Schneider*, Attorney General of Kansas; *Mike Greely*, Attorney General of Montana; *Paul L. Douglas*, Attorney General of Nebraska, and *Steven C. Smith*, Assistant Attorney General; *Robert List*, Attorney General of Nevada, and *Harry W. Swainston*, Deputy Attorney General; *Toney Anaya*, Attorney General of New Mexico, and *Richard A. Simms*, Special Assistant Attorney General; *Allen I. Olson*, Attorney General of North Dakota; *Larry D. Derryberry*, Attorney General of Oklahoma, and *Larry D. Barnett*, Assistant Attorney General; *James A. Redden*, Attorney General of Oregon, and *Al J. Laue*, Solicitor General; *William J. Janklow*, Attorney General of South Dakota,

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The United States seeks to impound 2.4 million acre-feet of water from California's Stanislaus River as part of its Central Valley Project. The California State Water Resources Control Board ruled that the water could not be allocated to the Government under state law unless it agreed to and complied with various conditions dealing with the water's use. The Government then sought a declaratory judgment in the District Court for the Eastern District of California to the effect that the United States can impound whatever unappropriated water is necessary for a federal reclamation project without complying with state law. The District Court held that, as a matter of comity, the United States must apply to the State for an appropriation permit, but that the State must issue the permit without condition if there is sufficient unappropriated water. 403 F. Supp. 874 (1975). The Court of Appeals for the Ninth Circuit affirmed, but held that § 8 of the Reclamation Act of 1902, 32 Stat. 390, as codified, 43 U. S. C. §§ 372, 383, rather than comity, requires the United States to apply for the permit. 558 F. 2d 1347 (1977). We granted certiorari to review the decision of the Court of Appeals insofar as it holds that California cannot condition its allocation of water to a federal reclamation project. 434 U. S. 984 (1977). We now reverse.

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and *Warren R. Neufeld*, Assistant Attorney General; *John L. Hill*, Attorney General of Texas; *Slade Gorton*, Attorney General of Washington, and *Charles B. Roe, Jr.*, Senior Assistant Attorney General; and *V. Frank Mendicino*, Attorney General of Wyoming, and *Jack D. Palma II*, Special Assistant Attorney General. *Thomas Graff* and *Frederic P. Sutherland* filed a brief for the Environmental Defense Fund et al. as *amici curiae* urging reversal.

Kenneth A. Kuney, John P. Fraser, and *T. V. A. Dillon* filed a brief for the Friant Water Users Assn. et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Robert S. Pelcyger* and *Robert D. Stitser* for the Pyramid Lake Paiute Tribe of Indians; and by *Charles J. Meyers pro se*.

I

Principles of comity and federalism, which the District Court and the Court of Appeals referred to and which have received considerable attention in our decisions, are as a legal matter based on the Constitution of the United States, statutes enacted by Congress, and judge-made law. But the situations invoking the application of these principles have contributed importantly to their formation. Just as it has been truly said that the life of the law is not logic but experience, see O. Holmes, The Common Law 1 (1881), so may it be said that the life of the law is not political philosophy but experience.

The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climatic regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences. Those who first set foot in North America from ships sailing the tidal estuaries of Virginia did not confront the same problems as those who sailed flat boats down the Ohio River in search of new sites to farm. Those who cleared the forests in the old Northwest Territory faced totally different physiographic problems from those who built sod huts on the Great Plains. The final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the "Great American Desert," brought the participants in that expansion face to face with the necessity for irrigation in a way that no previous territorial expansion had.

In order to correctly ascertain the meaning of the Reclamation Act of 1902, we must recognize the obvious truth that the history of irrigation and reclamation before that date was much fresher in the minds of those then in Congress than it is to us today. "[T]he afternoon of July 23, 1847, was the true date of the beginning of modern irrigation. It was on that afternoon that the first band of Mormon pioneers built a small

dam across City Creek near the present site of the Mormon Temple and diverted sufficient water to saturate some 5 acres of exceedingly dry land. Before the day was over they had planted potatoes to preserve the seed." [1] During the subsequent half century, irrigation expanded throughout the arid States of the West, supported usually by private enterprise or the local community.[2] By the turn of the century, however, most of the land which could be profitably irrigated by such small-scale projects had been put to use. Pressure mounted on the Federal Government to provide the funding for the massive projects that would be needed to complete the reclamation, culminating in the Reclamation Act of 1902.[3]

The arid lands were not all susceptible of the same sort of reclamation. The climate and topography of the lands that constituted the "Great American Desert" were quite different from the climate and topography of the Pacific Coast States. As noted in both *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950), and *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275 (1958), the latter States not only had a more pronounced seasonal variation and precipitation than the intermountain States, but the interior portions of California had climatic advantages which many of the intermountain States did not.

> "The prime value in our national economy of the lands of summer drought on the Pacific coast is as a source of

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[1] A. Golzé, Reclamation in the United States 6 (2d ed. 1961). The author was at the time of publication the Chief Engineer of the California Department of Water Resources and had been formerly Assistant Commissioner of the United States Bureau of Reclamation.

[2] *Id.*, at 6–12.

[3] *Id.*, at 12–13. Private development has continued to be a major contributor to the reclamation of the West. From 1902 to 1950, federal reclamation projects increased the amount of irrigated land by 5,700,000 acres. This still only accounted, however, for approximately one-fifth of the irrigated acreage in the 17 Western States covered by the Reclamation Act of 1902. During the same period from 1902 to 1950, private reclamation opened up over 10,000,000 acres for irrigation. *Id.*, at 14, Table 1–1.

plant products that require mild winters and long growing seasons. Citrus fruits, the less hardy deciduous fruits, fresh vegetables in winter—these are their most important contributions at present. Rainless summers make possible the inexpensive drying of fruits, which puts into the market prunes, raisins, dried peaches, and apricots. In its present relation to American economy in general, the primary technical problem of agriculture in the Pacific Coast States is to make increasingly more effective use of the mild winters and the long growing season in the face of the great obstacle presented by the rainless summers. To overcome that obstacle supplementary irrigation is necessary. Hence the key position of water in Pacific Coast agriculture." [4]

If the term "cooperative federalism" had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it. In that Act, Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States. Reflective of the "cooperative federalism" which the Act embodied is § 8, whose exact meaning and scope are the critical inquiries in this case:

"[*N*]*othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation,* or any vested right acquired thereunder, *and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,* and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* that the

[4] U. S. Department of Agriculture, Climate and Man 204 (1941). For a general description of water conditions in California and the Californians' answer to them, see E. Cooper, Aqueduct Empire (1968).

> right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390 (emphasis added).

Perhaps because of the cooperative nature of the legislation, and the fact that Congress in the Act merely authorized the expenditure of funds in States whose citizens were generally anxious to have them expended, there has not been a great deal of litigation involving the meaning of its language. Indeed, so far as we can tell, the first case to come to this Court involving the Act at all was *Ickes* v. *Fox*, 300 U. S. 82 (1937), and the first case to require construction of § 8 of the Act was *United States* v. *Gerlach Live Stock Co.*, *supra*, decided nearly half a century after the enactment of the 1902 statute.[5]

The New Melones Dam, which this litigation concerns, is part of the California Central Valley Project, the largest reclamation project yet authorized under the 1902 Act.[6] The Dam, which will impound 2.4 million acre-feet of water of California's Stanislaus River, has the multiple purposes of flood control, irrigation, municipal use, industrial use, power, recreation, water-quality control, and the protection of fish and wildlife. The waters of the Stanislaus River that will be impounded behind the New Melones Dam arise and flow solely in California.

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[5] Section 8 of the 1902 Reclamation Act has been mentioned in only seven cases decided by this Court. See *Ide* v. *United States*, 263 U. S. 497 (1924); *Nebraska* v. *Wyoming*, 295 U. S. 40 (1935); *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945); *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950); *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275 (1958); *City of Fresno* v. *California*, 372 U. S. 627 (1963); *Arizona* v. *California*, 373 U. S. 546 (1963).

[6] The New Melones Dam was authorized by the Flood Control Acts of 1944 and 1962, 58 Stat. 901, 76 Stat. 1191. As in the case of all other reclamation projects, Congress specifically directed that the Dam be constructed and operated "pursuant to the Federal reclamation laws," 76 Stat. 1191, the principal one of which is the Reclamation Act of 1902.

The United States Bureau of Reclamation, as it has with every other federal reclamation project, applied for a permit from the appropriate state agency, here the California State Water Resources Control Board, to appropriate the water that would be impounded by the Dam and later used for reclamation.[7] After lengthy hearings, the State Board found that unappropriated water was available for the New Melones Dam during certain times of the year. Although it therefore approved the Bureau's applications, the State Board attached 25 conditions to the permit. California State Water Resources Control Board, Decision 1422 (Apr. 14, 1973). The most important conditions prohibit full impoundment until the Bureau is able to show firm commitments, or at least a specific plan, for the use of the water.[8] The State Board

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[7] Under California law, any person who wishes to appropriate water must apply for a permit from the State Water Resources Control Board. Cal. Water Code Ann. §§ 1201 and 1225 (West 1971). The Board is to issue a permit only if it determines that unappropriated water is available and that the proposed use is both "reasonable" and "beneficial" and best serves "the public interest." §§ 1240, 1255, and 1375; Cal. Const., Art. 10, § 2. In determining whether to issue a permit, the Board is to consider not only the planned use of the water but also alternative uses, including enhancement of water quality, recreation, and the preservation of fish and wildlife. Cal. Water Code Ann. §§ 1242.5, 1243, and 1257 (West 1971). The Board can also impose such conditions in the permit as are necessary to insure the "reasonable" and "beneficial" use of the water and to protect "the public interest." §§ 1253 and 1391.

[8] Other conditions prohibit collection of water during periods of the year when unappropriated water is unavailable; require that a preference be given to water users in the water basin in which the New Melones Dam is located; require storage releases to be made so as to maintain maximum and minimum chemical concentrations in the San Joaquin River and protect fish and wildlife; require the United States to provide means for the release of excess waters and to clear vegetation and structures from the reservoir sites; require the filing of additional reports and studies; and provide for access to the project site by the State Board and the public. Still other conditions reserve jurisdiction to the Board to impose further conditions on the appropriations if necessary to protect the "beneficial use"

concluded that without such a specific plan of beneficial use the Bureau had failed to meet the California statutory requirements for appropriation.

> "The limited unappropriated water resources of the State should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future. When the evidence indicates, as it does here, that an applicant already has a right to sufficient water to meet his needs for beneficial use within the foreseeable future, rights to additional water should be withheld and that water should be reserved for other beneficial uses." *Id.*, at 16.

II

The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress. The rivers, streams, and lakes of California were acquired by the United States under the 1848 Treaty of Guadalupe Hidalgo with the Republic of Mexico, 9 Stat. 922. Within a year of that treaty, the California gold rush began, and the settlers in this new land quickly realized that the riparian doctrine of water rights that had served well in the humid regions of the East would not work in the arid lands of the West. Other settlers coming into the intermountain area, the vast basin and range country which lies between the Rocky Mountains on the east and the Sierra Nevada and Cascade Ranges on the west, were forced to the same conclusion. In its place, the doctrine of prior appropriation, linked to beneficial use of the water, arose through local customs, laws,

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of the water involved. The United States did not challenge any of the conditions under state law, but instead filed the federal declaratory action that is now before us.

and judicial decisions. Even in this early stage of the development of Western water law, before many of the Western States had been admitted to the Union, Congress deferred to the growing local law. Thus, in *Broder* v. *Water Co.*, 101 U. S. 274 (1879), the Court observed that local appropriation rights were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect." *Id.*, at 276.

In 1850, California was admitted as a State to the Union "on an equal footing with the original States in all respects whatever." 9 Stat. 452. While § 3 of the Act admitting California to the Union specifically reserved to the United States all "public lands" within the limits of California, no provision was made for the unappropriated waters in California's streams and rivers. One school of legal commentators held the view that, under the equal-footing doctrine, the Western States, upon their admission to the Union, acquired exclusive sovereignty over the unappropriated waters in their streams. In 1903, for example, one leading expert on reclamation and water law observed that "[i]t has heretofore been assumed that the authority of each State in the disposal of the water-supply within its borders was unquestioned and supreme, and two of the States have constitutional provisions asserting absolute ownership of all water-supplies within their bounds." E. Mead, Irrigation Institutions 372 (1903).[9] Such commentators were not without some support from language

[9] Dr. Elwood Mead was Chief of Irrigation Investigations for the Department of Agriculture at the time of his treatise's publication. Dr. Mead was a principal witness before Congress during the hearings on the Reclamation Act of 1902 and later became Commissioner of Reclamation, serving in that position from 1924 until his death in 1936.

Three Western States have adopted constitutional provisions asserting absolute ownership over the waters in their States. See Colo. Const., Art. 16, § 5; N. D. Const., Art. 17, § 210; Wyo. Const., Art. 8, § 1. Other States have asserted ownership by statute. See, *e. g.*, Idaho Code § 42–101 (1977). The courts of these States have upheld these provisions on the

in contemporaneous decisions of this Court. See S. Wiel, Water Rights in the Western States §§ 40–43, pp. 84–95 (2d ed. 1908). Thus, in *Kansas* v. *Colorado*, 206 U. S. 46 (1907), the Court noted:

> "While arid lands are to be found mainly, if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen.
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> . . . . . .
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> "In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into States. . . . But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other States, *Pollard* v. *Hagan*, [3 How. 212]; *Shively* v. *Bowlby*, [152 U. S. 1]; *Hardin* v. *Shedd*, 190 U. S. 508, 519; and Colorado by its legislation has recognized the right of appropriating the flowing waters to the purposes of irrigation." *Id.*, at 92 and 95.

And see *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690, 702–703, and 709 (1899).

As noted earlier, reclamation of the arid lands began almost immediately upon the arrival of pioneers to the Western States. Huge sums of private money were invested in systems to transport water vast distances for mining, agriculture, and ordinary consumption. Because a very high percentage of land in the West belonged to the Federal Government, the canals and ditches that carried this water frequently crossed

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ground that the States gained absolute dominion over their nonnavigable waters upon their admission to the Union. See, *e. g.*, *Stockman* v. *Leddy*, 55 Colo. 24, 27–29, 129 P. 220, 221–222 (1912); *Farm Investment Co.* v. *Carpenter*, 9 Wyo. 110, 61 P. 258 (1900).

federal land. In 1862, Congress opened the public domain to homesteading. Homestead Act of 1862, 12 Stat. 392. And in 1866, Congress for the first time expressly opened the mineral lands of the public domain to exploration and occupation by miners. Mining Act of 1866, ch. 262, 14 Stat. 251. Because of the fear that these Acts might in some way interfere with the water rights and systems that had grown up under state and local law, Congress explicitly recognized and acknowledged the local law:

> "[W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." § 9, 14 Stat. 253.

The Mining Act of 1866 was not itself a grant of water rights pursuant to federal law. Instead, as this Court observed, the Act was " 'a voluntary recognition of a preëxisting right of possession, constituting a valid claim to its continued use.' " *United States* v. *Rio Grande Dam & Irrig. Co., supra,* at 705. Congress intended "to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition." [10] *Basey* v. *Gallagher,* 20 Wall. 670, 684 (1875). See *Broder* v. *Water Co., supra,* at 276; *Jennison* v. *Kirk,* 98 U. S. 453, 459–461 (1879).[11]

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[10] Senator Stewart, the most vocal of the 1866 Act's supporters, noted during debate that § 9 *"confirms* the rights to the use of water . . . as established by local law and the decisions of the courts. In short, it proposes no new system, but *sanctions, regulates, and confirms a system to which the people are devotedly attached."* Cong. Globe, 39th Cong., 1st Sess., 3227 (1866) (emphasis added).

[11] Four years later, in the Act of July 9, 1870, 16 Stat. 218, Congress reaffirmed that occupants of federal public land would be bound by state

In 1877, Congress took its first step toward encouraging the reclamation and settlement of the public desert lands in the West and made it clear that such reclamation would generally follow state water law. In the Desert Land Act of 1877, Congress provided for the homesteading of arid public lands in larger tracts

> "by [the homesteader's] conducting water upon the same, within the period of three years [after filing a declaration to do so], *Provided however* that the right to the use of water by the person so conducting the same . . . shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: *and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.*" Ch. 107, 19 Stat. 377 (emphasis added).

This Court has had an opportunity to construe the 1877 Desert Land Act before. In *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142 (1935), Mr. Justice Sutherland [12] explained that, through this language, Congress

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water law, by providing that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights." The effect of the 1866 and 1870 Acts was not limited to rights previously acquired. "They reach[ed] into the future as well, and approve[d] and confirm[ed] the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 155 (1935).

[12] Mr. Justice Sutherland had grown up in Utah and was very familiar with the Westerners' efforts to tame the desert. Elected to Congress in

"effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." *Id.*, at 158. The nonnavigable waters thereby severed were "reserved for the use of the public under the laws of the states and territories." *Id.*, at 162. Congress' purpose was not to federalize the prior-appropriation doctrine already evolving under local law. Quite the opposite:

> "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' *Kansas* v. *Colorado*, 206 U. S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See *Wyoming* v. *Colorado*, 259 U. S. 419, 465." *Id.*, at 163–164.

See also *Gutierres* v. *Albuquerque Land & Irrig. Co.*, 188 U. S. 545, 552–553 (1903); *Ickes* v. *Fox*, 300 U. S. 82, 95 (1937); *Brush* v. *Commissioner*, 300 U. S. 352, 367 (1937).

1900, Sutherland was assigned to the Committee on Irrigation. According to his biographer, Sutherland's "intimate knowledge of the water problem in the West enabled him to make a conspicuous contribution" in this assignment. J. Paschal, Mr. Justice Sutherland: A Man Against the State 43 (1951). Sutherland was one of the principal participants in the formulation of the Reclamation Act of 1902. *Id.*, at 44.

Congress next addressed the task of reclaiming the arid lands of the West 11 years later. The opening of the arid lands to homesteading raised the specter that settlers might claim lands more suitable for reservoir sites or other irrigation works, impeding future reclamation efforts. Congress addressed this problem in the Act of Oct. 2, 1888, 25 Stat. 527, which provided:

> "[A]ll the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law."

Unfortunately, this language, which had been hastily drafted and passed, had the practical effect of reserving all of the public lands in the West from settlement.[13] As a result, "there came a perfect storm of indignation from the people of the West, which resulted in the prompt repeal of the extraordinary [1888] provision." 29 Cong. Rec. 1955 (1897) (statement of Cong. McRae). In the Act of Aug. 30, 1890, 26 Stat. 391, Congress repealed the 1888 provision except insofar as it reserved reservoir sites. Then, in the Act of Mar. 3, 1891, 26 Stat. 1101, as amended, 43 U. S. C. § 946, Congress provided for rights-of-way across the public lands to be used by "any canal or ditch company formed for the purpose of irrigation." The apparent purpose of the 1890 and 1891 Acts was to reserve reservoir sites from settlement but to open them for use in reclamation projects.[14] As before, Congress expressly indi-

[13] See 29 Cong. Rec. 1948 (1897) (discussion by Cong. Lacey); *id.*, at 1955 (discussion by Cong. McRae).

[14] *Ibid.* And see Report to the Secretary of the Interior on the Blue

cated that the reclamation would be controlled by state water law: [15]

> "[T]he right of way through the public lands and reservations of the United States is hereby granted . . . for the purpose of irrigation . . . , to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals . . . ; *Provided,* That . . . *the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.*" 26 Stat. 1101 (emphasis added).

The Secretary of the Interior, unfortunately, interpreted the 1890 and 1891 Acts as reserving governmentally surveyed reservoir sites *from* use rather than *for* use. Congress rectified this interpretation in the Act of Feb. 26, 1897, ch. 335, 29 Stat. 599, which provided:

> "[A]ll reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or

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Water Land & Irrigation Co. by the Acting Commissioner of the General Land Office, Nov. 23, 1895.

[15] Congress' intent was reflected in contemporary administrative decisions. According to the Department of the Interior, the 1891 Act "relegate[d] the matter of appropriation and control of all natural sources of water supply in the state of California to the authority of that state. The act of March 3, 1891, deals only with the right of way over the public lands to be used for the purposes of irrigation, leaving the disposition of the water to the state." *H. H. Sinclair,* 18 I. D. 573, 574 (1894). In a circular of the same period explaining the 1891 Act, the Interior Department noted that the "control of the flow and use of the water is . . . a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands." 18 I. D. 168, 169–170 (1894).

> private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate."

The final provision of the 1897 Act was proposed as a floor amendment by Representative, later Speaker, Cannon to expressly preserve States' control over reclamation within their borders. It was clearly the opinion of a majority of the Congressmen who spoke on the bill, however, that such an amendment was unnecessary except out of an excess of caution.[16] According to Congressman Lacey, Chairman of the House Committee on Public Lands and a principal sponsor of the

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[16] "A reservoir site without water is entirely useless. The water is the particular thing in question, and the waters are controlled by the States through which they flow, and not by the United States of America. These are surface waters, the waters of small streams not navigable, and the States control them.

. . . . . .

"[T]he United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the States." 29 Cong. Rec. 1948–1949 (1897) (Cong. Lacey). "It is the State alone that owns and controls the water, under the constitution of our States; and I suppose that is true under the laws of every State." *Id.*, at 1951 (Cong. Bell). "The amendment which has been proposed by the gentleman from Illinois [Mr. CANNON], and adopted, really serves no purpose, because it merely reenacts the existing law. It would be the law even if the act of 1891 were not in existence. The waters belong to the States. The United States Government has always recognized that, and the States have enacted legislation directly controlling the use of the waters." *Id.*, at 1952 (Cong. Shafroth). Only Congressman Terry, who unsuccessfully opposed the bill, suggested the contrary. In his view, the Federal Government could use its control of the land to regulate the price of the water stored. See *id.*, at 1949–1950.

1897 Act, the water through which the reclamation would be accomplished

> "does not belong to the [Federal] Government. The reservoirs in which the water is stored belong to the Government, but the water belongs to the States and will be controlled by them. The amendment proposed by the gentleman from Illinois [Mr. CANNON] relieves this measure from all possible doubt upon that subject. I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the States and Territories to regulate and control the management and the price of the water." 29 Cong. Rec. 1952 (1897).

Congressman Lacey's statement found reflection in contemporaneous decisions of this Court holding that, with limited exceptions not relevant to reclamation, authority over intrastate waterways lies with the States. In *United States* v. *Rio Grande Dam & Irrig. Co.*, for example, New Mexico's authority to adopt a prior appropriation system of water rights for the Rio Grande River was challenged. The Court unhesitatingly held that "as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." 174 U. S., at 702–703. The Court noted that there are two limitations to the State's exclusive control of its streams—reserved rights "so far at least as may be necessary for the beneficial uses of the government property," *id.*, at 703, and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the States' power that, except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters. "Unquestionably the State . . . has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the [river] be disturbed." *Id.*, at 709.

Similarly, in *Kansas* v. *Colorado*, 206 U. S. 46 (1907), the United States claimed that it had a right in the Arkansas River superior to that of Kansas and Colorado stemming from its power "to control the whole system of the reclamation of arid lands." The Court disagreed and held that state reclamation law must prevail. The United States, of course, could appropriate water and build projects to reclaim its own public lands. "As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property." *Id.*, at 92. But federal legislation could not "override state laws in respect to the general subject of reclamation." *Ibid.* "[E]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Id.*, at 93. With respect to the question that had been presented in *Rio Grande Dam & Irrig. Co.*, the Court reaffirmed that each State "may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State." 206 U. S., at 94.

III

It is against this background that Congress passed the Reclamation Act of 1902. With the help of the 1891 and 1897 Acts, private and state reclamation projects had gone far toward reclaiming the arid lands,[17] but massive projects were now needed to complete the goal and these were beyond the means of private companies and the States. In 1900, therefore, all of the major political parties endorsed federal funding of reclamation projects. While the Democratic Party's platform specified none of the attributes of a federal program other than to recommend that it be "intelligent,"

[17] See A. Golzé, Reclamation in the United States 9–23 (1961).

K. Porter & D. Johnson, National Party Platforms 115 (2d ed. 1961), the Republicans specifically recommended that the reclamation program "reserv[e] control of the distribution of water for irrigation to the respective States and territories." *Id.*, at 123. In his first message to Congress after assuming the Presidency, Theodore Roosevelt continued the cry for national funding of reclamation and again recommended that state law control the distribution of water.[18]

As a result of the public demand for federal reclamation funding, a bill was introduced into the 57th Congress to use the money from the sale of public lands in the Western States to build reclamation projects in those same States. The projects would be built on federal land and the actual construction and operation of the projects would be in the hands of the Secretary of the Interior. But the Act clearly provided that state water law would control in the appropriation and later distribution of the water. As originally introduced, § 8 of the Reclamation Act provided: [19]

> "[N]othing in this act shall be construed as affecting or intended to affect or to in any way interfere with

[18] "The pioneer settlers on the arid public domain chose their homes along streams from which they could themselves divert the water to reclaim their holdings. Such opportunities are practically gone. There remain, however, vast areas of public land which can be made available for homestead settlement, but only by reservoirs and main-line canals impracticable for private enterprise. These irrigation works should be built by the National Government. The lands reclaimed by them should be reserved by the Government for actual settlers, and the cost of construction should so far as possible be repaid by the land reclaimed. *The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights.*" H. R. Doc. No. 1, 57th Cong., 1st Sess., XXVIII (1901) (emphasis added).

[19] In the House, § 8 was amended so as to provide, rather than that state law "shall govern and control," that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with" state law "relating to the control, appropriation, use, or distribution of water." According to Representative Newlands, who had introduced

> the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation; but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this act: *Provided,* That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects. First, and of controlling importance to this case, the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. According to Representative Mondell, the principal sponsor of the reclamation bill in the House, once the Secretary determined that a reclamation project was feasible and that there was an adequate supply of water for the project, "the Secretary of the Interior would proceed to make the appropriation of the necessary water *by giving the notice and complying with the forms of law of the State or Territory in which the works were located.*" 35 Cong. Rec. 6678 (1902) (emphasis added). The Secretary of the Interior could not take any action in appropriating the waters of the state streams "which could not be undertaken by an individual or corporation if it were in the position of the Government as regards the ownership of its lands." H. R. Rep. No. 794, 57th Cong., 1st Sess., 7–8 (1902). Thus, in response to the

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the original bill in the House, the original bill was "identical in its provisions, though differing somewhat in phraseology," to the ultimate Act. 35 Cong. Rec. 6673 (1902). The bill may have been amended to make clear the congressional intent that state law could not override the specific directives of Congress that water rights would be appurtenant to the land and would not be sold to tracts of greater than 160 acres. See *id.*, at 6674. See generally n. 21, *infra.*

statement of an opponent to the bill that the Secretary would be allowed to condemn water even if in violation of state law, Representative Mondell briskly responded:

> "Whereabouts does the gentleman find any such provision as he is arguing? Whereabouts in the bill is there anything that attempts to give the Federal Government any right to condemn or to take any water right or do anything which an individual could not do? Will the gentleman point out any place or any provision for the Federal Government to do anything that I could not do if I owned the public land?
>
> "Mr. RAY of New York. Do you say there is nothing in this bill that provides for condemnation?
>
> "Mr. MONDELL. *The bill provides explicitly that even an appropriation of water can not be made except under State law.*" 35 Cong. Rec. 6687 (1902) (emphasis added).[20]

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[20] Earlier in the debates, Representative Mondell observed that under the Reclamation Act the Secretary of the Interior would only have the power to condemn water rights in compliance with state law. "In some of the arid States . . . water rights can be condemned for the purposes contemplated in this bill, and in such States the Secretary of the Interior would have as much authority to condemn as any other individual, and no more. Where the State laws do not recognize the right to condemn property for the purposes contemplated in the act, it will not be condemned, and there is the end of it . . . . [W]here the State laws do not authorize condemnation, and projects can not be carried on without condemnation, those particular projects will not be undertaken, and others, where there is no such obstacle, will." 35 Cong. Rec. 6680 (1902).

In response to Representative Mondell's statement, Representative Ray asked whether he had "forgotten . . . that they have in this bill a provision which purports to confer upon the Secretary of the Interior power to condemn water and water rights for the purpose of carrying out this scheme." Representative Mondell responded that the power existed only "[w]herever the State law gives him authority to do so." *Id.*, at 6688.

Representative Sutherland also noted that the "Secretary must proceed in the condemnation proceedings under the laws of the State." *Id.*, at 6769.

Second, once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law. As explained by Senator Clark of Wyoming, one of the principal supporters of the reclamation bill in the Senate, "the control of waters after leaving the reservoirs shall be vested in the States and Territories through which such waters flow." *Id.*, at 2222. As Senator Clark went on to explain:

> "[I]t is right and proper that the various States and Territories should control in the distribution. The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. . . . In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions.
>
> "Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities. To take from these experienced men, to take from the legislatures of the various States and Territories, the control of this question at the present time would be something little less than suicidal. They are the men qualified to deal with the question, the laws are written upon their statute books and read of all men, and in every one of these States and Territories the laws have been passed that most diligently regard the rights of the settler and of the farmer . . . ." *Ibid.*

As Representative Sutherland, later to be a Justice of this Court, succinctly put it, "if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail." *Id.*, at 6770. Different water rights in

the same State would be governed by different laws and would frequently conflict.[21]

A principal motivating factor behind Congress' decision to

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[21] Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States. Congress provided in § 8 itself that the water right must be appurtenant to the land irrigated and governed by beneficial use, and in § 5 Congress forbade the sale of reclamation water to tracts of land of more than 160 acres. It is conceivable, of course, that Congress may not have intended to actually override state law when inconsistent with these other provisions but instead only intended to exercise a veto power over any reclamation project that, because of state law, could not be operated in compliance with these provisions. A project simply would not be built by the Federal Government if such a conflict existed. As the House Report explained the workings of the 160-acre limitation and the appurtenance requirement:

"The character of the water rights contemplated being clearly defined, the Secretary of the Interior would not be authorized to begin construction of works for the irrigation of lands in any State or Territory until satisfied that the laws of said State or Territory fully recognized and protected water rights of the character contemplated. This feature of the bill will undoubtedly tend to uniformity and perfection of water laws throughout the region affected." H. R. Rep. No. 794, 57th Cong., 1st Sess., 6 (1902).

Some support for this interpretation of the congressional intent can also be found in contemporaneous administrative material of the Department of the Interior. See, *e. g.*, Department of the Interior, Proceedings of First Conference of Engineers of the Reclamation Service 103 (1904) ("Before the filing of the first notice of appropriation of water in any State the matter of the advisability of making such filing should be submitted to the chief engineer, because some of the State laws may be such that it is impossible to comply with them in conducting operations under the reclamation act"); Department of the Interior, Second Annual Report of the Reclamation Service 33 (1904) ("[C]areful study must be made of the effect of State laws upon each project under consideration in that particular State. It appears probable that in some of the States radical changes in the laws must be made before important projects can be undertaken").

In previous cases interpreting § 8 of the 1902 Reclamation Act, however, this Court has held that state water law does not control in the distribution of reclamation water *if* inconsistent with other congressional directives to the Secretary. See *Ivanhoe Irrigation District* v. *McCracken*,

defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality. Congress also intended to "follo[w] the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water." *Id.*, at 6678 (Cong. Mondell). As Representative Mondell noted after reviewing the legislation discussed in Part II of this opinion: "Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard." *Id.*, at 6679.[22]

Both sponsors and opponents of the Reclamation Act also expressed constitutional doubts as to Congress' power to override the States' regulation of waters within their borders. Congress was fully aware that the Supreme Court had "in

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357 U. S. 275 (1958); *City of Fresno* v. *California*, 372 U. S. 627 (1963). We believe that this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act. See n. 25, *infra*. Whatever the intent of Congress with respect to state control over the distribution of water, however, Congress in the 1902 Act intended to follow state law as to appropriation of water and condemnation of water rights. Under the 1902 Act, the Secretary of the Interior was authorized in his discretion to "locate and construct" reclamation projects. As the legislative history of the 1902 Act convincingly demonstrates, however, if state law did not allow for the appropriation or condemnation of the necessary water, Congress did not intend the Secretary of the Interior to initiate the project. Subsequent legislation authorizing a specific project may by its terms signify congressional intent that the Secretary condemn or be permitted to appropriate the necessary water rights for the project in question, but no such legislation was considered by the Court of Appeals in its opinion in this case. That court will be free to consider arguments by the Government to this effect on remand. See Part V, *infra*.

[22] In addition to the legislation discussed in Part II of this opinion, Congressman Mondell also cited to the National Forest Act of 1897, 30 Stat. 36, "provid[ing] for the use of waters on such reserves 'under the laws of the State wherein such forest reservations are situated.'" 35 Cong. Rec. 6679 (1902).

several decisions recognized the right of the State to regulate and control the use of water within its borders." *Ibid.* (Cong. Mondell). According to the House Report, "Section 8 *recognizes State control over waters of nonnavigable streams* such as are used in irrigation." H. R. Rep. No. 794, 57th Cong., 1st Sess., 6 (1902) (emphasis added).[23]

IV

For almost half a century, this congressionally mandated division between federal and state authority worked smoothly. No project was constructed without the approval of the Secretary of the Interior, and the United States through this official preserved its authority to determine how federal funds should be expended. But state laws relating to water rights were observed in accordance with the congressional directive contained in § 8 of the Act of 1902. In 1958, however, the first of two cases was decided by this Court in which private landowners or municipal corporations contended that state water law had the effect of overriding specific congressional directives to the Secretary of the Interior as to the operation of federal reclamation projects. In *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275, the Supreme Court of California decided that

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[23] Opponents of the 1902 Reclamation Act also expressed doubt whether Congress could constitutionally override the States' regulation of waters within their borders:

"Again, to be clear, the United States as to its public lands in a State is only an owner with the rights of private ownership, the same as those of an individual. When territory is admitted into the Union as a State the sovereignty of the United States is surrendered to the new State and the sovereignty of the State attaches and becomes paramount as to every foot of soil, unless expressly reserved to the General Government, and subject to the right of that Government to condemn for a public use of the United States necessary to the performance of its governmental functions or to its preservation." H. R. Rep. No. 794, 57th Cong., 1st Sess., pt. 2 (Minority Views), 16–17 (1902).

See also *id.*, at 8; 35 Cong. Rec. 6687 (1902) (Cong. Ray).

California law forbade the 160-acre limitation on irrigation water deliveries expressly written into § 5 of the Reclamation Act of 1902, and that therefore, under § 8 of the Reclamation Act, the Secretary was required to deliver reclamation water without regard to the acreage limitation. Both the State of California and the United States appealed from this judgment, and this Court reversed it, saying:

> "Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that '[n]o right to the use of water . . . shall be sold for a tract exceeding one hundred and sixty acres to any one landowner . . . .' Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5." 357 U. S., at 291–292.

Five years later, in *City of Fresno* v. *California*, 372 U. S. 627 (1963), this Court affirmed a decision of the United States Court of Appeals for the Ninth Circuit holding that § 8 did not require the Secretary of the Interior to ignore explicit congressional provisions preferring irrigation use over domestic and municipal use.[24]

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[24] "Section 9 (c) of the Reclamation Project Act of 1939 . . . provides: 'No contract relating to municipal water supply or miscellaneous purposes . . . shall be made unless, in the judgment of the Secretary [of the Interior], it will not impair the efficiency of the project for irrigation purposes.' . . . It therefore appears clear that Fresno has no preferential rights to contract for project water, but may receive it only if, in the Secretary's judgment, irrigation will not be adversely affected." 372 U. S., at 630–631.

The Court also concluded in a separate portion of its opinion: "§ 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. . . . Rather, the effect of § 8 in such a case is to leave to state

Petitioners do not ask us to overrule these holdings, nor are we presently inclined to do so.[25] Petitioners instead ask us to hold that a State may impose any condition on the "control, appropriation, use, or distribution of water" through a federal reclamation project that is not inconsistent with clear congressional directives respecting the project. Petitioners concede, and the Government relies upon, dicta in our cases that may point to a contrary conclusion. Thus, in *Ivanhoe*, the Court went beyond the actual facts of that case and stated:

> "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. . . . We read nothing in § 8 that compels the

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law the definition of the property interests, if any, for which compensation must be made." *Id.*, at 630. Because no provision of California law was actually inconsistent with the exercise by the United States of its power of eminent domain, this statement was dictum. It also might have been apparent from examination of the congressional authorization of the Central Valley Project that Congress intended the Secretary to have the power to condemn any necessary water rights. We disavow this dictum, however, to the exent that it implies that state law does not control even where not inconsistent with such expressions of congressional intent.

[25] As discussed earlier in n. 21, it is at least arguable that Congress did not intend to override state water law when it was inconsistent with congressional objectives such as the 160-acre limitation, but intended instead to enforce those objectives simply by the Secretary's refusal to approve a project which could not be built or operated in accordance with them. This intent, however, is not clear, and Congress may have specifically amended § 8 to provide that state law could not override congressional directives with respect to a reclamation project. See n. 19, *supra*. *Ivanhoe* and *City of Fresno* read the legislative history of the 1902 Act as evidencing Congress' intent that specific congressional directives which were contrary to state law regulating distribution of water would override that law. Even were this aspect of *Ivanhoe res nova*, we believe it to be the preferable reading of the Act.

> United States to deliver water on conditions imposed by the State." 357 U. S., at 291–292.

Like dictum was repeated in *City of Fresno, supra,* at 630, and in this Court's opinion in *Arizona* v. *California,* 373 U. S. 546 (1963), where the Court also said:

> "The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in *Ivanhoe Irr. Dist.* v. *McCracken,* . . . and reaffirmed in *City of Fresno* v. *California* . . . . Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in [*Ivanhoe*], we cannot, consistently with *Ivanhoe,* hold that the Secretary must be bound by state law in disposing of water under the Project Act." *Id.,* at 586–587.

While we are not convinced that the above language is diametrically inconsistent with the position of petitioners,[26] or that it squarely supports the United States, it undoubtedly goes further than was necessary to decide the cases presented to the Court. *Ivanhoe* and *City of Fresno* involved conflicts between § 8, requiring the Secretary to follow state law as to water rights, and other provisions of Reclamation Acts that placed specific limitations on how the water was to be distributed. Here the United States contends that it may ignore state law even if no explicit congressional directive conflicts with the conditions imposed by the California State Water Control Board.[27]

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[26] Part of the Court's opinion in *Ivanhoe* indeed would appear to directly support petitioners' position. Thus, the Court concluded that under § 8 of the 1902 Reclamation Act the United States must "comply with state law when, in the construction and operation of a reclamation project, *it becomes necessary for it to acquire water rights* or vested interests therein." 357 U. S., at 291 (emphasis added).

[27] The State of California was an appellant in *Ivanhoe* and supported the decision of the Court of Appeals for the Ninth Circuit in *City of Fresno.*

In *Arizona* v. *California*, the States had asked the Court to rule that state law would control in the distribution of water from the Boulder Canyon Project, a massive multistate reclamation project on the Colorado River.[28] After reviewing the legislative history of the Boulder Canyon Project Act, 43 U. S. C. § 617 *et seq.*, the Court concluded that because of the unique size and multistate scope of the Project, Congress did not intend the States to interfere with the Secretary's power to determine with whom and on what terms water contracts would be made.[29] While the Court in rejecting the States' claim repeated the language from *Ivanhoe* and *City of Fresno* as to the scope of § 8, there was no need for it to reaffirm such language except as it related to the singular legislative history of the Boulder Canyon Project Act.

But because there is at least tension between the above-quoted dictum and what we conceive to be the correct reading of § 8 of the Reclamation Act of 1902, we disavow the dictum to the extent that it would prevent petitioners from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question. Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That

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[28] The Special Master agreed with the States that they had such power under § 14 of the Project Act, 43 U. S. C. § 617m, which incorporated the Reclamation Act of 1902, and § 18 of the Project Act, 43 U. S. C. § 617q, which provided that nothing in the Act should be construed "as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders." The Court disagreed, with three Justices dissenting.

[29] Even though concluding that the power of the States was so limited, the Court went on to note that the Project Act "plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river." 373 U. S., at 588.

section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water." Nor, as the United States contends, does § 8 merely require the Secretary of the Interior to file a notice with the State of his intent to appropriate but to thereafter ignore the substantive provisions of state law. The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law. The Government's interpretation would trivialize the broad language and purpose of § 8.

Indeed, until recently, it has been the consistent position of the Secretary of the Interior and the Bureau of Reclamation, who are together responsible for executing the provisions of the Reclamation Act of 1902, that in appropriating water for reclamation purposes the Bureau must comply with state law. The Bureau's operating instructions, for example, provide:

> "State and Federal law and policy establish the framework for project formulation. *Project plans must comply with State legal provisions or priorities for beneficial use of water* . . . . In some cases, . . . State laws . . . have been modified to meet specific conditions in the authorization of particular projects." U. S. Department of Interior, Bureau of Reclamation, Reclamation Instructions § 116.3.1 (1959) (emphasis added).
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> "*The Reclamation Act recognizes the interests and rights of the States in the utilization and control of their water resources and requires the Bureau, in carrying out provisions of the Act, to proceed in conformity with State water laws.* Since the construction of a reservoir and the subsequent storage and release of water for beneficial purposes normally entails stream regulation, it is necessary to reach an understanding with the States regarding

reservoir operating limitations." *Id.*, § 231.5.1 (1957) (emphasis added).

With respect to the Central Valley Project, the Bureau advised Congress that " '[r]eclamation law . . . recognizes State water law and rights thereunder' " and that "Bureau filings on water are subject to State approval." 95 Cong. Rec. A961 (1949).[30]

Indeed, until the unnecessarily broad language of the Court's opinion in *Ivanhoe*, both the uniform practice of the Bureau of Reclamation and the opinions of the Court clearly supported petitioners' argument that they may impose any condition not inconsistent with congressional directive. In holding that the United States was not an indispensable party in *Nebraska* v. *Wyoming*, 295 U. S. 40 (1935), this Court observed:

> "[T]he Secretary of the Interior, pursuant to the [1902] Act, applied to the state engineer of Wyoming and obtained from him permission . . . to appropriate waters, and was awarded a priority date. . . . All of the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release waters of the river are subject to the authority of Wyoming.
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> . . . . . .
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> "The bill alleges, and we know as matter of law [citing § 8 of the 1902 Reclamation Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming

[30] A remarkably similar history of administrative construction and advice to Congress was given weight in *United States* v. *Gerlach Live Stock Co.*, 339 U. S., at 735–736. Considerable weight must be accorded to these interpretations of the Reclamation Act by the agency charged with its operation. See *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *Perkins* v. *Matthews*, 400 U. S. 379 (1971); *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976).

in the same manner as a private appropriator or an irrigation district formed under the state law." *Id.*, at 42–43.

Ten years later, in its final decision in *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945), the Court elaborated on its original observation:

> "All of these steps make plain that [the Reclamation] projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act. We can say here what was said in *Ickes* v. *Fox*, [300 U. S. 82 (1937)]: 'Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. . . . The government was and remained simply a carrier and distributor of the water . . . , with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.'
>
> . . . . .
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> "We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a compliance with that direction. . . ." *Id.*, at 613–615.

The United States suggests that, even if the Congress of 1902 intended the Secretary of the Interior to comply with state law, more recent legislative enactments have subjected reclamation projects "to a variety of federal policies that leave no room for state controls on the operation of a project or on

the choice of uses it will serve." [31] Brief for United States 89. While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives. The Flood Control Act of 1944, 58 Stat. 888, for example, which first authorized the New Melones Dam, provides that it is the "policy of the Congress to recognize the interests and rights of the States in determining the development of watersheds within their borders and likewise their interests and rights in water utilization and control." Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U. S. C. § 666 (a), which subjects the United States to state-court jurisdiction for general stream adjudications:

> "In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
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> . . . . . .
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> "Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State,

[31] It is worth noting that the original Reclamation Act of 1902 was not devoid of such directives. That Act provided that the charges for water should "be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and . . . be apportioned equitably" and that water rights should "be appurtenant to the land irrigated, and beneficial use . . . the basis, the measure, and the limit of the right"; the Act also forbade sales to tracts of more than 160 acres. Despite these restraints on the Secretary, however, it is clear from the language and legislative history of the 1902 Act that Congress intended state law to control where it was not inconsistent with the above provisions.

if there is to be a proper administration of the water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951).

V

Because the District Court and the Court of Appeals both held that California could not impose any conditions whatever on the United States' appropriation permit, those courts did not reach the United States' alternative contention that the conditions actually imposed are inconsistent with congressional directives as to the New Melones Dam. Nor did they reach California's contention that the United States is barred by principles of collateral estoppel from challenging the consistency of the permit conditions. Assuming, *arguendo,* that the United States is still free to challenge the consistency of the conditions, resolution of their consistency may well require additional factfinding. We therefore reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Early in its opinion, the majority identifies the critical issues in this case as to the "meaning and scope" of § 8 of the Reclamation Act of 1902. In quest of suitable answers, the majority launches on an extensive survey of 19th- and 20th-century statutory and judicial precedents that partially delineate the relationship between federal and state law with respect to the conservation and use of the water resources of the Western States. At the end of this Odyssean journey, the conclusion seems to be that under the relevant federal statutes containing the reclamation policy of the United States, the intention of the Congress has been to recognize local and state law as controlling both the "appropriation and distribution"

of the water resources that are the object of federal reclamation projects.

Straightaway, however, and with obvious reluctance, it is conceded in a footnote that § 8 does not really go so far and that Congress, after all, "did not intend to relinquish total control of the actual distribution of the reclamation water to the States." *Ante*, at 668 n. 21. Where following state law would be inconsistent with other provisions of the Reclamation Act or with congressional directives to the Secretary contained in other statutes, § 8 and local law must give way.[1] Otherwise, however, it is insisted that by virtue of § 8, state policy must govern federal projects. The next section of the majority opinion is devoted to defending this conclusion and to explaining why it refuses to follow our prior cases construing § 8 much more narrowly than the present temporal majority finds acceptable.

Meanwhile, the opinion has also concluded that because of § 8, the United States may not acquire water rights by appropriation or condemnation except in accordance with state law. If, for example, particular water rights are not subject to condemnation under state law by private interests, neither may they be taken by the United States. This issue, going to the acquisition by the United States of water rights

[1] Section 8 of the Reclamation Act, 32 Stat. 390, now 43 U. S. C. §§ 372, 383, provided:

"[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

by eminent domain, is not among the questions presented in this case, and the views expressed in this respect are no sounder and no less inconsistent with our prior cases than is the majority's view that the distribution of water developed by federal reclamation projects is to be governed by state law.

I

Four of the five major cases bearing on the construction of § 8 have arisen out of the Central Valley Reclamation Project, a massively expensive reclamation undertaking which aimed at redistributing the water in California's Central Valley, which the State was unable to finance and which the Federal Government eventually undertook.[2] The salient features of the project, which need not be repeated, have been outlined in the Court's cases. *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950); *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275 (1958); *Dugan* v. *Rank*, 372 U. S. 609 (1963); and *City of Fresno* v. *California*, 372 U. S. 627 (1963). One of the project's principal components is the Friant Dam, which interrupted the flow of the upper San Joaquin River, the impounded waters being distributed to irrigate lands not theretofore served by San Joaquin water. To supply the needs of the lower river basin, water was imported from the Sacramento River Valley to the north. The difficulty was that Sacramento water was delivered to the San Joaquin some 60 miles below the Friant Dam. The riparian owners and others along this section of the river, the flow of which would at the very least be severely diminished, naturally sought their remedy.

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[2] As the United States said in its brief in *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275 (1958), the Central Valley Project was "the largest single undertaking pursuant to the federal reclamation program. The project was adopted by the United States at the instance of the State of California, at an estimated cost to the United States of more than $800,000,000." Brief for United States as *Amicus Curiae*, O. T. 1957, Nos. 122–125, p. 28.

In *Gerlach, supra,* the Court of Claims had made compensation awards to the owners of certain riparian grasslands that had been watered by the seasonal overflow along this section of the river. This overflow would no longer take place. The United States insisted that the project was an undertaking under the commerce power to control navigation and that the Government need not compensate for the destruction of riparian rights. The Court disagreed, concluding that Congress, in an exercise of its constitutional power to tax and spend for the general welfare, had elected to proceed under the reclamation laws and to pay for any vested rights taken by the Government: "[W]hether required to do so or not, Congress elected to recognize any state-created rights and to take them under its power of eminent domain." 339 U. S., at 739 (footnote omitted).

Since the closing of the Dam would terminate the annual inundation of the lands involved, the inquiry became whether there had been a taking of any water rights defined and recognized by state law. After an extensive inquiry, the Court determined that the Court of Claims had properly understood state law, and the compensation awards were affirmed.

The next case before this Court involving the Central Valley Project was *Ivanhoe, supra.* That case arose out of proceedings in the state courts, required by federal statute, to confirm contracts for the use of water entered into between state irrigation districts and a state water agency, on the one hand, and the United States on the other. The contracts contained provisions against the use of project water on tracts in excess of 160 acres, a provision specified by § 5 of the Reclamation Act of 1902 and substantially re-enacted in the Omnibus Adjustment Act of 1926, 44 Stat. 650, as amended, 70 Stat. 524, 43 U. S. C. § 423e.[3] They also contained the

[3] Section 5 of the Reclamation Act, 32 Stat. 389, provided in pertinent part: "No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land-

40-year payout provisions provided for in § 9 of the Reclamation Project Act of 1939, 53 Stat. 1193, as amended, 72 Stat. 542, 43 U. S. C. § 485h. The California Supreme Court refused to confirm the contracts because it construed § 8 of the Reclamation Act of 1902 as requiring the contracts to conform to state law and because the 160-acre limitation and the payout provisions were, for separate reasons, contrary to the law of California. This judgment rested in part on the theory that the water rights acquired by the United States were, by virtue of § 8, subject to the normal trust obligations to water users that were imposed by state law and that were inconsistent with the proposed contract provisions.[4] As described by the Attorney General of California, who represented the state water districts in this Court, the California Supreme Court reasoned that the water rights needed to perform the contracts

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owner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made."

[4] The issue posed was revealed by the brief for the United States in *Ivanhoe:*

"The California Supreme Court also erred in upholding the claim of denial of just compensation. Chief Justice Gibson correctly stated in his dissenting opinion below that 'if there is any state-recognized vested right which, in fact, conflicts with the acreage limitation, that right may be taken and compensated for by the federal government under its power of eminent domain' (AJS 73, 79; cf. p. 48). The trust declared and applied by the majority of the court cannot have the effect of imposing a state restriction on the federal power of eminent domain. That power 'is inseparable from sovereignty' because it permits 'acquisition of the means or instruments by which alone governmental functions can be performed.' 'It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment.' *Kohl* v. *United States,* 91 U. S. 367, 371–372, 374. It makes no difference whether the property 'sought to be condemned is held . . . in trust instead of in fee.' *United States* v. *Carmack,* 329 U. S. 230, 239. The beneficiaries may press their claims to compensation." Brief for United States as *Amicus Curiae,* O. T. 1957, Nos. 122–125, p. 56.

could not be acquired by the United States; this was an untenable position, the Attorney General contended, because "never before has it been held that property rights in a state could be endowed with attributes which would prevent the United States from acquiring the rights it needs to accomplish a federal purpose." Brief for Appellants in *Ivanhoe Irrigation District* v. *McCracken*, O. T. 1957, Nos. 122–125, p. 21.[5]

This Court unanimously reversed the judgment of the California Supreme Court. It first ruled: "[T]he authority to impose the conditions of the contracts here comes from the power of the Congress to condition the use of federal funds, works, and projects on compliance with reasonable requirements. And . . . if the enforcement of those conditions impairs any compensable property rights, then recourse for just compensation is open in the courts." 357 U. S., at 291. The Court also rejected the argument that § 8 required the Secretary to follow state law that was inconsistent with § 5. As the Court understood § 8, "it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to *acquire* water rights or vested interests therein." 357 U. S., at 291. (Emphasis added.) The United States would be obliged to pay for any water rights which were vested under state law and which it took, "[b]ut the *acquisition* of water rights must not be confused with the *operation* of federal projects." *Ibid.* (Emphasis added.) The Court could find nothing in § 8 that "compels the United States to *deliver* water on conditions imposed by the State," 357 U. S., at 292 (emphasis added), and quoted with approval from *Nebraska* v. *Wyoming*, 325 U. S. 589, 615 (1945): "'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.'" Accord-

[5] The California Attorney General's analysis of the California Supreme Court's opinion is to be found in his Brief for Appellants 54–60.

ingly, the Court held that § 8 did not require the Secretary to ignore § 5, the provisions of which had been national policy for over 50 years.

Like *Gerlach*, the *Dugan* and *Fresno* cases involved the consequences of the Friant Dam on those dependent on the first 60 miles of the San Joaquin downstream from the project. These cases arose from the judgment of the Court of Appeals for the Ninth Circuit entered in a suit brought by water-right claimants below the Friant Dam, including the city of Fresno, for an injunction to prevent the storing and diverting of water at the Dam until a satisfactory remedy for the deprivation of their rights had been achieved. *State* v. *Rank*, 293 F. 2d 340 (1961). The defendants were local officials of the United States Reclamation Bureau, a number of irrigation and utility districts, and later the United States itself. The District Court overruled the claim that the suit was an unconsented suit against the United States and ordered that the injunction issue unless the Government effected a "physical solution" adequate to satisfy plaintiffs' water rights, which it held the United States was obligated to respect. The Court of Appeals dismissed the United States from the action and then inquired whether the suit against the officials and the districts was also a suit against the United States. This depended in the first instance on whether these officers were acting within their statutory and constitutional authority. If they were not, the suit could go forward. Plaintiffs contended, among other things, that Congress had not conferred any right to condemn water rights along this stretch of the river and that in any event plaintiffs had rights under California's county-of-origin and watershed-of-origin statutes that were not subject to condemnation under state law and hence, pursuant to § 8, were not seizable by the United States.[6]

[6] As the Court of Appeals explained, one of the three reasons submitted by the riparian owners for the lack of authority to condemn on the part of the United States was as follows:

"The third contention of the plaintiffs is that California's County of

The Court of Appeals rejected the argument based on § 8 and state law. Section 7 of the original Reclamation Act had authorized the Secretary to acquire any rights necessary to carry out the provisions of the Act and to do so by purchase or by condemnation under judicial process. Moreover, in expressly authorizing the Central Valley Project in 1937, the Rivers and Harbors Act, 50 Stat. 850, provided that the Secretary could "acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes . . . ." The Court of Appeals thus found ample authority for the condemnation or taking of the plaintiffs' rights and held that, even if California law gave these plaintiffs a preference over the United States and the other defendants as to rights to appropriate surplus waters, it did not follow that the preferred rights could not be taken by the United States. "While a state can bestow property rights on its citizens which the United States must respect, it cannot take from the United States the power to acquire those rights." 293 F. 2d, at 354. Although holding that the United States had ample power to seize the water rights at issue, the Court of Appeals went on to hold, nevertheless, that no taking in the legal sense had transpired; the officials were mere trespassers, were acting outside their authority, and could be enjoined. Absent condemnation of vested rights, § 8 required the project to respect those rights in operating the project. Hence, an injunction was warranted.

The case was brought to this Court where the public officers continued to claim that they were acting legally and were not subject to suit. Plaintiffs argued, among other things,

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Origin and Watershed of Origin statutes . . . (which under § 8 of the Reclamation Act . . . the United States is bound to respect), prevent diversion of waters of the San Joaquin beyond its watershed until the rights of these plaintiffs have been satisfied; that to condemn the rights of these plaintiffs for the purpose of such diversion is to disregard California law contrary to § 8." 293 F. 2d, at 354.

that their riparian rights could not be taken by condemnation for purposes of use outside the county of origin or the watershed of origin. Brief for Respondents in *Delano-Earlimart Irrig. Dist.* v. *Rank*, O. T. 1962, No. 115, pp. 30–41. This Court in *Dugan*, however, unanimously agreed with the Court of Appeals that the United States had ample statutory authority to take the asserted rights. "The question was specifically settled in *Ivanhoe Irrigation District* v. *McCracken* . . . , where we said that such rights could be acquired by the payment of compensation 'either through condemnation or, if already taken, through action of the owners in the courts.' " 372 U. S., at 619. Furthermore, the Court noted: "The power to seize which was granted here had no limitation placed upon it by the Congress, nor did the Court of Appeals bottom its conclusion on a finding of any limitation. [The United States had] plenary power to seize the whole of respondents' rights in carrying out the congressional mandate . . . ." *Id.*, at 622–623.

Disagreeing, however, with the Court of Appeals as to the taking issue, the Court ruled that the power to take had actually been exercised, and properly so, and that the suit against the officers was therefore a suit against the United States and should be dismissed. The remedy of the plaintiffs, as it was in *Gerlach*, was in the Court of Claims.

The Court also granted the petition for certiorari filed by the city of Fresno and dealt separately with the city's case. 372 U. S. 627 (1963). Fresno, as a riparian, overlying landowner, had vested rights to underground waters from a source fed by the San Joaquin River. These rights were threatened by the anticipated diminishment of the San Joaquin below Friant Dam. Among other things, the city claimed that the water necessary to satisfy its rights was being diverted to areas beyond the limits permitted by the county-of-origin and watershed-of-origin statutes of the State of California; under these statutes the city's rights were preferred and were not

subject to condemnation under § 8 and state law.[7] Opinions of the Attorney General of California were submitted in support of this claim. Brief for Petitioner in *City of Fresno* v. *California*, O. T. 1962, No. 51, pp. 148–150.[8] These claims were essentially those of a riparian owner to the maintenance of the flow of the San Joaquin River. Fresno also claimed, however, that under the county-of-origin and watershed-of-origin statutes, it had a prior right to Friant Dam water in an amount necessary to satisfy its needs and that project water could not be delivered beyond the limits prescribed by these statutes until the city's needs were met.[9] Section 8, it was argued, required the United States to respect the city's rights under these statutes. The city also claimed a statutory priority for municipal uses, as well as the right to purchase project water for less than the price Bureau officials proposed to charge.

The Court rejected each of these claims. The United States had authority, despite § 8 and state law, to acquire Fresno's riparian rights, and had done so. To that extent, the city's recourse was in the Court of Claims, as in *Dugan*. Section 8 "does not mean that state law may operate to pre-

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[7] Question 3 of Fresno's petition for certiorari specifically posed the issue whether the United States "can take percolating underground waters . . . by condemnation or eminent domain for agricultural use in areas outside the county and watershed of origin." Pet. for Cert., O. T. 1962, No. 51, p. 6.

[8] The State Attorney General's opinion submitted was in relevant part: " 'The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority b[y] condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture.' " Brief for Petitioner, O. T. 1962, No. 51, pp. 148–149.

[9] The dual nature of Fresno's claim, first as a riparian owner with vested rights to percolating water, and second as a municipality claiming watershed preference under state law to project-developed water, is made clear in 293 F. 2d, at 351–352, 360–361.

vent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrigation District* v. *McCracken* . . . ." 372 U. S., at 630. Nor did § 8 require "compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the priority of domestic over irrigation uses." 372 U. S., at 629–630. The more limited role of § 8 "is to leave to state law the definition of the property interests, if any, for which compensation must be made." 372 U. S., at 630. The Court went on to say that in any event the California watershed and county statutes did not give Fresno the priority claimed and that the claims with respect to a municipal priority and to a lower water price were contrary to § 9 of the Reclamation Project Act of 1939.[10]

Fresno was decided on April 15, 1963, having been argued on January 7 of that year. The opinion and judgment in *Arizona* v. *California*, 373 U. S. 546, were announced on June 3, 1963, the case having been argued for the second time in November 1962. In *Arizona*, the Special Master had concluded that in choosing between users within each State and in settling the terms of his contracts with them, the Secretary was required to follow state law by virtue of §§ 14 and 18 of the Project Act and by reason of § 8 of the Reclamation Act. The Court expressly disagreed, relying on *Ivanhoe* and *Fresno* and saying with respect to § 8:

> "The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been dis-

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[10] The usual rule in this Court is that when two independent reasons are given to support a judgment, "the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other." *Union Pacific R. Co.* v. *Mason City & Fort Dodge R. Co.*, 199 U. S. 160, 166 (1905); *United States* v. *Title Ins. Co.*, 265 U. S. 472, 486 (1924). See also *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 537 (1949); *Massachusetts* v. *United States*, 333 U. S. 611, 623 (1948).

posed of by this Court in *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U. S. 275 (1958), and reaffirmed in *City of Fresno* v. *California*, 372 U. S. 627 (1963). In *Ivanhoe* we held that, even though § 8 of the Reclamation Act preserved state law, that general provision could not override a specific provision of the same Act prohibiting a single landowner from getting water for more than 160 acres. We said:

"'As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming*, [325 U. S.,] at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.' [357 U. S.,] at 291–292.

"Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act." 373 U. S., at 586–587.

The Court thus held again that § 8 did not require the Secretary to follow state law in distributing project water because § 8 dealt with *acquisition*, not *distribution*, of reclamation water.

II

The majority reads *Ivanhoe* as holding that § 5 and similar explicit statutory directives are exceptions to § 8's otherwise controlling mandate that state law must govern both the acquisition and distribution of reclamation water. This mis-

interprets that opinion. It is plain enough that in response to the argument that § 8 subjected the § 5 contract provisions to the strictures of state law, the Court squarely rejected the submission on the ground that § 8 dealt only with the acquisition of water rights and required the United States to respect the water rights that were vested under state law. That the Court might have saved the § 5 provision on a different and narrower ground more acceptable to the present Court majority does not render the ground actually employed any less of a holding of the Court or transform it into the discardable dictum the majority considers it to be.

It is also beyond doubt that both *Fresno* and *Arizona* considered *Ivanhoe* to contain a holding that § 8 was limited to water-right acquisition and did not reach the distribution of reclamation water. But whatever the proper characterization of the Court's pronouncement in *Ivanhoe* might be, *Fresno* itself held that in distributing project water the United States, despite state law and § 8, not only was not bound by the municipal-preference laws of California, which were contrary to a specific federal statute, but also could export water from the watershed without regard to the county- and watershed-of-origin statutes. The Court held the latter even though no provision of federal law forbade the federal officers from complying with the preferences assertedly established by those state laws.

Much the same is true of *Arizona*, where the Court heard two arguments totaling over 22 hours and considered voluminous briefs that dealt with a variety of subjects, including the important issue of the impact of § 8 on the Secretary's freedom to contract for the distribution of water. In its opinion, the Court not only dealt with both *Ivanhoe* and *Fresno* as considered holdings that § 8 did not bear on distribution rights, but also expressly disagreed with its Special Master and squarely rejected claims that the Secretary could not contract for the sale of water except in compliance with the priorities

established by state law. Nor, as suggested by the majority, is there anything in the *Arizona* case to suggest that the Court arrived at its conclusion by factors peculiar to the statutes authorizing the project. The particular terms of the Secretary's contracts were not authorized or directed by any federal statute. The Court's holding that he was free to proceed as he did was squarely premised on the proposition that § 8 did not control the distribution of the project water.

The short of the matter is that no case in this Court, until this one, has construed § 8 as the present majority insists that it be construed. All of the relevant cases are to the contrary.

Our cases that the Court now discards are relatively recent decisions dealing with an issue of statutory construction and with a subject matter that is under constant audit by Congress. As the majority suggests, reclamation project authorizations are normally accompanied by declarations that the provisions of the reclamation laws shall be applicable. Here, the New Melones Dam, which was and is a part of the Central Valley Project, was first authorized in 1944, 58 Stat. 901, and again in 1962, 76 Stat. 1191. The latter legislation provided for construction of the Dam by the Army Corps of Engineers but for operation and maintenance by the Secretary of the Interior "pursuant to the Federal reclamation laws . . . ." Those laws included § 8, which by that time had been construed in *Ivanhoe* as set out above. There were no amendments to § 8, which is now codified in 43 U. S. C. §§ 372 and 383, when the project was reauthorized in 1962.

Furthermore, in amending the reclamation laws in 1972, Congress provided that except as otherwise indicated in the amendments, "the provisions of the Federal reclamation laws, and Acts amendatory thereto, are continued in full force and effect." 43 U. S. C. § 421d (1970 ed., Supp. V). More specifically, § 421g stated that nothing in the amendments "shall be construed to repeal or limit the procedural and substantive requirements of sections 372 and 383 of this title."

There is no hint of disagreement with the construction placed on these sections in *Ivanhoe, Dugan, Fresno,* and *Arizona.*

Only the revisionary zeal of the present majority can explain its misreading of our cases and its evident willingness to disregard them. Congress has not disturbed these cases, and until it does, I would respect them. In contrast to *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978), there is no problem here of reconciling inconsistent lines of cases or of correcting an error with respect to an issue not briefed or argued and raised by the Court *sua sponte. All* of the relevant cases are contrary to today's holding, and in none of them was the Court on a frolic of its own. The courts below were quite right in holding that the State was without power under the reclamation laws to impose conditions on the operation of the New Melones Dam and on the distribution of project water developed by that Dam, which would be undertaken with federal funds.

III

Even less explicable is the majority's insistence on reaching out to overturn the holding of this Court in *Fresno,* which reflected the decision in *Dugan* and was in turn grounded on a similar approach in *Ivanhoe,* that state law may not restrict the power of the United States to condemn water rights. The issue was squarely presented and decided in both *Dugan* and *Fresno.* In both cases it was claimed—and State Attorney General's opinions supported the claim—that some of the rights at issue were not condemnable under state law and that § 8 therefore forbade their taking by the Federal Government. In both cases, the claim was rejected by this Court, just as it was in the Court of Appeals. Without briefing and argument, the majority now discards these holdings in a footnote. See *ante,* at 671–672, n. 24.

Section 7 of the Reclamation Act, now 43 U. S. C. § 421, authorizes the Secretary to acquire any rights or property

by purchase or condemnation under judicial process, and the Attorney General is directed to institute suit at the request of the Secretary. Also, as Mr. Justice Jackson explained for the Court in *Gerlach*, 339 U. S., at 735 n. 8, when the Central Valley Project was authorized in 1937, the Secretary of the Interior was "authorized to acquire 'by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes . . . .' 50 Stat. 844, 850." Furthermore, § 10 of the Reclamation Act, now 43 U. S. C. § 373, authorizes the Secretary to perform any and all acts necessary to carry out the Act. As the Court said in *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 233 (1914), "the Government was authorized by § 7 of the act of June 17, 1902, ch. 1093, 32 Stat. 388, under which this improvement was being made to acquire any property necessary for the purpose and if need be to appropriate it." And in *Henkel* v. *United States*, 237 U. S. 43, 50 (1915), the Court, referring to §§ 7 and 10, said:

> "In carrying out the purposes of the act, the Secretary of the Interior is authorized to acquire any rights or property necessary for that purpose, and to acquire the same, either by purchase or by condemnation. He is specifically authorized to perform any and all acts necessary and proper for the purpose of carrying into effect the provisions of the act. Authority could hardly have been conferred in more comprehensive terms, and we do not believe it was the intention of Congress, because of the Indians' right of selection of lands under the circumstances here shown, to reserve such lands from the operation of the act. To do so might defeat the reclamation projects which it was evidently the purpose of Congress to authorize and promote."

Never has there been a suggestion in our cases that Congress, by adopting § 8, intended to permit a State to disentitle the Government to acquire the property necessary or appropriate

to carry out an otherwise constitutionally permissible and statutorily authorized undertaking. *Gerlach, Ivanhoe, Dugan* and *Fresno* are to the contrary.

The Court's "disavowal" of our prior cases and of the Government's power to condemn state water rights, all without briefing and argument, is a gratuitous effort that I do not care to join and from which I dissent.

IV

Although I do not join the Court in reconstruing the controlling statutes as it does, the Court's work today is a precedent for "setting things right" in the area of statutory water law so as to satisfy the views of a current Court majority. And surely the dicta with which the Court's opinion is laced today deserve no more or no less respect than what it has chosen to label as dicta in past Court decisions. Of course, the matter is purely statutory and Congress could easily put an end to our feuding if it chose to make it clear that local authorities are to control the spending of federal funds for reclamation projects and to control the priorities for the use of water developed by federal projects.

UNITED STATES *v.* NEW MEXICO

CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

No. 77-510. Argued April 24, 25, 1978—Decided July 3, 1978

The United States, in setting aside the Gila National Forest from other public lands, *held* to have reserved the use of water out of the Rio Mimbres only where necessary to preserve the timber in the forest or to secure favorable water flows, and hence not to have a reserved right for aesthetic, recreational, wildlife-preservation, and stockwatering purposes. That this was Congress' intent is revealed in the limited purposes for which the national forest system was created and in Congress' deference to state water law in the Organic Administration Act of 1897 and other legislation. While the Multiple-Use Sustained-Yield Act of 1960 was intended to broaden the purposes for which national forests had previously been administered, Congress did not intend thereby to reserve additional water in forests previously withdrawn under the 1897 Act. Pp. 698-718.

90 N. M. 410, 564 P. 2d 615, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion dissenting in part, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, *post*, p. 718.

Assistant Attorney General Moorman argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Barnett, Peter R. Steenland,* and *Dirk D. Snel.*

Richard A. Simms, Special Assistant Attorney General of New Mexico, argued the cause for respondent. With him on the brief were *Toney Anaya,* Attorney General, *Peter Thomas White,* and *Don Klein,* Special Assistant Attorneys General.

John Undem Carlson argued the cause for the Twin Lakes Reservoir and Canal Co. et al. as *amici curiae* urging affirm-

ance. With him on the brief were *Alan E. Boles, Jr., Charles M. Elliott,* and *Charles J. Beise.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Rio Mimbres rises in the southwestern highlands of New Mexico and flows generally southward, finally disappearing in a desert sink just north of the Mexican border. The river originates in the upper reaches of the Gila National Forest, but during its course it winds more than 50 miles past privately owned lands and provides substantial water for both irrigation and mining. In 1970, a stream adjudication was begun by the State of New Mexico to determine the exact rights of each user to water from the Rio Mimbres.[1] In this

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*A brief of *amici curiae* urging affirmance was filed by *Ralph Hunsaker* for the Arizona Water Commission, and for their respective States by *Evelle J. Younger,* Attorney General of California; *Robert B. Hansen,* Attorney General of Utah; *Michael T. Greely,* Attorney General of Montana; *Wayne L. Kidwell,* Attorney General of Idaho, and *Josephine Beeman,* Assistant Attorney General; *Slade Gorton,* Attorney General of Washington, and *Charles B. Roe, Jr.,* Senior Assistant Attorney General; *Robert F. List,* Attorney General of Nevada, and *Harry W. Swainston,* Deputy Attorney General; *James A. Redden,* Attorney General of Oregon, and *Clarence R. Kruger,* Assistant Attorney General; *J. D. MacFarlane,* Attorney General of Colorado, and *David W. Robbins,* Deputy Attorney General; *V. Frank Mendicino,* Attorney General of Wyoming, and *Jack D. Palma II,* Assistant Attorney General. Briefs of *amici curiae* urging affirmance were also filed by *Gary J. Greenberg* for Molycorp, Inc.; by *J. Wayne Woodbury* for Phelps Dodge Corp.; and by *M. Byron Lewis* and *Neil Vincent Wake* for the Salt River Project Agricultural Improvement and Power District.

[1] The suit was initially filed in 1966 as a private action by the Mimbres Valley Irrigation Co. to enjoin alleged illegal diversions from the Rio Mimbres. In 1970, the State of New Mexico, pursuant to New Mexico Stat. Ann. § 75–4–4 (1953), filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. Under 43 U. S. C. § 666 (a), "[c]onsent is given to join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system or other source," including the reserved rights

adjudication the United States claimed reserved water rights for use in the Gila National Forest. The State District Court held that the United States, in setting aside the Gila National Forest from other public lands, reserved the use of such water "as may be necessary for the purposes for which [the land was] withdrawn," but that these purposes did not include recreation, aesthetics, wildlife preservation, or cattle grazing. The United States appealed unsuccessfully to the Supreme Court of New Mexico. *Mimbres Valley Irrigation Co.* v. *Salopek*, 90 N. M. 410, 564 P. 2d 615 (1977). We granted certiorari to consider whether the Supreme Court of New Mexico had applied the correct principles of federal law in determining petitioner's reserved rights in the Mimbres. 434 U. S. 1008. We now affirm.

I

The question posed in this case—what quantity of water, if any, the United States reserved out of the Rio Mimbres when it set aside the Gila National Forest in 1899—is a question of implied intent and not power. In *California* v. *United States*, *ante*, at 653–663, we had occasion to discuss the respective authority of Federal and State Governments over waters in the Western States.[2] The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, however, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes. *Winters* v. *United States*, 207 U. S. 564, 577 (1908); *Arizona* v. *California*, 373 U. S. 546, 597–598 (1963); *Cappaert* v. *United States*, 426 U. S. 128, 143–146 (1976).

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of the United States. See *United States* v. *District Court for Eagle County*, 401 U. S. 520 (1971); *United States* v. *District Court for Water Div. No. 5*, 401 U. S. 527 (1971).

[2] See also *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604 (1978).

Recognition of Congress' power to reserve water for land which is itself set apart from the public domain, however, does not answer the question of the amount of water which has been reserved or the purposes for which the water may be used. Substantial portions of the public domain *have* been withdrawn and reserved by the United States for use as Indian reservations, forest reserves, national parks, and national monuments. And water is frequently necessary to achieve the purposes for which these reservations are made. But Congress has seldom expressly reserved water for use on these withdrawn lands. If water were abundant, Congress' silence would pose no problem. In the arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States, which lands form brightly colored swaths across the maps of these States.[3]

The Court has previously concluded that Congress, in giving

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[3] The percentage of federally owned land (*excluding* Indian reservations and other trust properties) in the Western States ranges from 29.5% of the land in the State of Washington to 86.5% of the land in the State of Nevada, an average of about 46%. Of the land in the State of New Mexico, 33.6% is federally owned. General Services Administration, Inventory Report on Real Property Owned by the United States Throughout the World as of June 30, 1974, pp. 17, 34, and App. 1, table 4. Because federal reservations are normally found in the uplands of the Western States rather than the flatlands, the percentage of water flow originating in or flowing through the reservations is even more impressive. More than 60% of the average annual water yield in the 11 Western States is from federal reservations. The percentages of average annual water yield range from a low of 56% in the Columbia-North Pacific water-resource region to a high of 96% in the Upper Colorado region. In the Rio Grande water-resource region, where the Rio Mimbres lies, 77% of the average runoff originates on federal reservations. C. Wheatley, C. Corker, T. Stetson, & D. Reed, Study of the Development, Management and Use of Water Resources on the Public Lands 402–406, and table 4 (1969).

the President the power to reserve portions of the federal domain for specific federal purposes, *impliedly* authorized him to reserve "appurtenant water then unappropriated *to the extent needed to accomplish the purpose of the reservation.*" *Cappaert, supra,* at 138 (emphasis added). See *Arizona* v. *California, supra,* at 595–601; *United States* v. *District Court for Eagle County,* 401 U. S. 520, 522–523 (1971); *Colorado River Water Cons. Dist.* v. *United States,* 424 U. S. 800, 805 (1976). While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert, supra,* at 141. See *Arizona* v. *California, supra,* at 600–601; *District Court for Eagle County, supra,* at 523. Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.[4]

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[4] In *Winters* v. *United States,* 207 U. S. 564 (1908), the Court was faced with two questions. First, whether Congress, when it created the Fort Belknap Indian Reservation by treaty, impliedly guaranteed the Indians a reasonable quantity of water. And second, whether Congress repealed this reservation of water when it admitted Montana to the Union one year later "upon an equal footing with the original States." In answering the first question, the Court emphasized that the reservation was formed to change the Indians' "nomadic and uncivilized" habits and to make them into "a pastoral and civilized people." *Id.,* at 576. Without water to irrigate the lands, however, the Fort Belknap Reservation would be "practically valueless" and "civilized communities could not be established thereon." *Ibid.* The purpose of the Reservation would thus be "impair[ed] or defeat[ed]." *Id.,* at 577. In answering the second question, the Court concluded that "it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them

This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state

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the means of continuing their old habits, yet did not leave them the power to change to new ones." *Ibid.*

In *Arizona* v. *California*, the Court only had reason to discuss the Master's finding that the United States had reserved water for use on Arizona Indian reservations. Arizona argued that there was "a lack of evidence showing that the United States in establishing the reservations intended to reserve water for them." 373 U. S., at 598. The Court disagreed:

"It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Id.*, at 598–599.

The Court also pointed to congressional debate that indicated that Congress had intended to reserve the water for the reservations. *Id.*, at 599.

In *Cappaert*, Congress had given the President the power to reserve "objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government." American Antiquities Preservation Act, 34 Stat. 225, 16 U. S. C. § 431 *et seq.* (1976 ed.). Pursuant to this power, the President had reserved Devil's Hole as a national monument. Devil's Hole, according to the Presidential Proclamation, is "'a unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System'"; it also contains "'a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region.'" 426 U. S., at 132. As the Court concluded, the pool was reserved specifically to preserve its scientific interest, principal of which was the Devil's Hole pupfish. Without a certain quantity of water, these fish would not be able to spawn and would die. This quantity of water was therefore impliedly reserved when the monument was proclaimed. *Id.*, at 141. The Court, however, went on to note that the pool "need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest. . . . The District Court thus tailored its injunction, very appro-

jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.[5] See *California* v. *United States*, *ante*, at 653–670, 678–679. Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

Congress indeed has appropriated funds for the acquisition under state law of water to be used on federal reservations. Thus, in the National Park Service Act of Aug. 7, 1946, 60 Stat. 885, as amended, 16 U. S. C. § 17j–2 (1976 ed.), Congress authorized appropriations for the "[i]nvestigation and establishment of water rights *in accordance with local custom, laws, and decisions of courts*, including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the

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priately, to *minimal need*, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation." *Ibid.* (emphasis added).

[5] See Hearings on S. 1275 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess., 302–310 (1964) (App. B, supplementary material submitted by Sen. Kuchel), listing 37 statutes in which Congress has expressly recognized the importance of deferring to state water law, from the Mining Act of 1866, § 9, 14 Stat. 253, to the Act of Aug. 28, 1958, § 202, 72 Stat. 1059, stating Congress' policy to "recognize and protect the rights and interests of the State of Texas in determining the development of the watersheds of the rivers . . . and its interests and rights in water utilization and control."

administration and public use of the national parks and monuments." (Emphasis added.) [6] The agencies responsible for administering the federal reservations have also recognized Congress' intent to acquire under state law any water not essential to the specific purposes of the reservation.[7]

The State District Court referred the issues in this case to a Special Master, who found that the United States was diverting 6.9 acre-feet per annum of water for domestic-residential use, 6.5 acre-feet for road-water use, 3.23 acre-feet for domestic-recreational use, and .10 acre-foot for "wildlife" purposes.[8] The Special Master also found that specified

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[6] See also the Department of Agriculture Organic Act of 1944, 58 Stat. 737, 16 U. S. C. § 526 (1976 ed.), authorizing the appropriation of funds "for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in land or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests."

[7] Before this Court's decisions in *FPC* v. *Oregon*, 349 U. S. 435 (1955) and *Arizona* v. *California*, recognizing reserved rights outside of Indian reservations, the Forest Service apparently believed that all of its water had to be obtained under state law. "Rights to the use of water for National Forest purposes will be obtained in accordance with State law." Forest Service Manual (1936). While the Forest Service has apparently modified its policy since those decisions, their Service Manual still indicates a policy of deferring to state water law wherever possible. "The right of the States to appropriate and otherwise control the use of water is recognized, and the policy of the Forest Service is to abide by applicable State laws and regulations relating to water use. When water is needed by the Forest Service either for development of programs, improvements, or other uses, action will be taken promptly to acquire necessary water rights. . . ." Forest Service Handbook § 2514 (Feb. 1960). "The rights to use water for national forest purposes will be obtained in accordance with State law. This policy is based on the act of June 4, 1897 (16 U. S. C. [§] 481)." Forest Service Manual § 2514.1 (Jan. 1960).

[8] The District Court of Luna County, in its finding of facts, did not list any current water use for "wildlife" purposes. App. 226–227. The United States apparently did not object to this deletion in state court nor does it challenge the deletion in its brief before this Court.

amounts of water were being used in the Gila National Forest for stockwatering and that an "instream flow" of six cubic feet per second was being "used" for the purposes of fish preservation. The Special Master apparently believed that all of these uses fell within the reservation doctrine, and also concluded that the United States might have reserved rights for future water needs, ordering it to submit a report on future requirements within one year of his decision.

The District Court of Luna County disagreed with many of the Special Master's legal conclusions, but agreed with the Special Master that the Government should prepare within one year a report covering any future water requirements that might support a claim of reserved right in the waters of the Rio Mimbres. The District Court concluded that the United States had not established a reserved right to a minimum instream flow for any of the purposes for which the Gila National Forest was established, and that any water rights arising from cattle grazing by permittees on the forest should be adjudicated "to the permittee under the law of prior appropriation and not to the United States."

The United States appealed this decision to the Supreme Court of New Mexico. The United States contended that it was entitled to a minimum instream flow for "aesthetic, environmental, recreational and 'fish' purposes." 90 N. M., at 412, 564 P. 2d, at 617. The Supreme Court of New Mexico concluded that, at least before the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U. S. C. § 528 *et seq.* (1976 ed.), national forests could only be created "to insure favorable conditions of water flow and to furnish a continuous supply of timber" and not for the purposes upon which the United States was now basing its asserted reserved rights in a minimum instream flow. 90 N. M., at 412–413, 564 P. 2d, at 617–619. The United States also argued that it was entitled to a reserved right for stockwatering purposes. The State Supreme Court again disagreed, holding that stockwatering

was not a purpose for which the national forests were created. *Id.*, at 414, 564 P. 2d, at 619.

II

A

The quantification of reserved water rights for the national forests is of critical importance to the West, where, as noted earlier, water is scarce and where more than 50% of the available water either originates in or flows through national forests.[9] When, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests.

The United States contends that Congress intended to reserve minimum instream flows for aesthetic, recreational, and fish-preservation purposes. An examination of the limited purposes for which Congress authorized the creation of national forests, however, provides no support for this claim. In the mid and late 1800's, many of the forests on the public domain were ravaged and the fear arose that the forest lands might soon disappear, leaving the United States with a shortage both of timber and of watersheds with which to encourage stream flows while preventing floods.[10] It was in answer to these fears that in 1891 Congress authorized the President to "set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations." Creative Act of Mar. 3, 1891, § 24, 26 Stat. 1103, as amended, 16 U. S. C. § 471 (repealed 1976).

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[9] Wheatley, Corker, Stetson & Reed, *supra* n. 3, at 211.

[10] J. Ise, The United States Forest Policy 62–118 (1972).

The Creative Act of 1891 unfortunately did not solve the forest problems of the expanding Nation. To the dismay of the conservationists, the new national forests were not adequately attended and regulated; fires and indiscriminate timber cutting continued their toll.[11] To the anguish of Western settlers, reservations were frequently made indiscriminately. President Cleveland, in particular, responded to pleas of conservationists for greater protective measures by reserving some 21 million acres of "generally settled" forest land on February 22, 1897.[12] President Cleveland's action drew immediate and strong protest from Western Congressmen who felt that the "hasty and ill considered" reservation might prove disastrous to the settlers living on or near these lands.[13]

Congress' answer to these continuing problems was threefold. It suspended the President's Executive Order of February 22, 1897; it carefully defined the purposes for which national forests could in the future be reserved; and it provided a charter for forest management and economic uses within the forests. Organic Administration Act of June 4, 1897, 30 Stat. 34, 16 U. S. C. § 473 *et seq.* (1976 ed.). In particular, Congress provided:

> *"No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use*

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[11] *Id.*, at 120–122.

[12] *Id.*, at 129. President Cleveland's action more than doubled the acreage of then-existing United States forest reserves. Cf. *id.*, at 120.

[13] *Id.*, at 130–139. Western Congressmen had objected since 1891 to what they viewed to be frequently indiscriminate creation of federal forest reserves. *Id.*, at 129–130. A major complaint of the Western Congressmen was that rampant reserving of forest lands by the United States might leave "no opportunity there for further enlargement of civilization by the establishment of agriculture or mining." 30 Cong. Rec. 1281 (1897) (Sen. Cannon).

> *and necessities of citizens of the United States;* but it is not the purpose or intent of these provisions, or of [the Creative Act of 1891], to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." 30 Stat. 35, as codified, 16 U. S. C. § 475 (1976 ed.) (emphasis added).

The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes—"[t]o conserve the water flows, and to furnish a continuous supply of timber for the people." [14] 30 Cong. Rec.

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[14] The Government notes that the Act forbids the establishment of national forests except *"to improve and protect the forest within the boundaries, or* for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber," and argues from this wording that "improvement" and "protection" of the forests form a third and separate purpose of the national forest system. A close examination of the language of the Act, however, reveals that Congress only intended national forests to be established for two purposes. Forests would be created only "to improve and protect the forest within the boundaries," or, *in other words,* "for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber."

This reading of the Act is confirmed by its legislative history. Nothing in the legislative history suggests that Congress intended national forests to be established for three purposes, one of which would be extremely broad. Indeed, it is inconceivable that a Congress which was primarily concerned with limiting the President's power to reserve the forest lands of the West would provide for the creation of forests merely "to improve and protect the forest within the boundaries"; forests would be reserved for their improvement and protection, but only to serve the purposes of timber protection and favorable water supply.

This construction is revealed by a predecessor bill to the 1897 Act which was introduced but not passed in the 54th Congress; the 1896 bill provided: "That the object for which public forest reservations shall be established under the provisions of the act approved March 3, 1891, shall be to protect and improve the forests *for the purpose of* securing a continuous

967 (1897) (Cong. McRae). See *United States* v. *Grimaud*, 220 U. S. 506, 515 (1911). National forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes.[15]

> "The objects for which the forest reservations should be made are the protection of the forest growth against destruction by fire and ax, and preservation of forest conditions upon which water conditions and water flow are dependent. The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these reservations for other purposes. They are not parks set aside for nonuse, but have been established for economic reasons." 30 Cong. Rec. 966 (1897) (Cong. McRae).

Administrative regulations at the turn of the century confirmed that national forests were to be reserved for only these two limited purposes.[16]

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supply of timber for the people and securing conditions favorable to water flow." H. R. 119, 54th Cong., 1st Sess. (1896) (emphasis added).

Earlier bills, like the 1897 Act, were less clear and could be read as setting forth either two or three purposes. Explanations of the bills by their congressional sponsors, however, clearly revealed that national forests would be established for only two purposes. Compare, for example, H. R. 119, 53d Cong., 1st Sess. (1893) ("[N]o public forest reservations shall be established except to improve and protect the forest within the reservation or for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people") with its sponsor's description of the bill, 25 Cong. Rec. 2375 (1893) (Cong. McRae) ("The bill authorizes the President to establish forest reservations, and to protect the forests 'for the purpose of securing favorable conditions of water flow and continuous supplies of timber to the people' ").

[15] See 30 Cong. Rec. 986 (1897) (Cong. Bell); *id.*, at 987 (Cong. Jones); H. R. Rep. No. 1593, 54th Cong., 1st Sess., 3 (1896); 25 Cong. Rec. 2435 (1893) (Cong. McRae); H. R. Rep. No. 2437, 52d Cong., 2d Sess., 2 (1893); S. Rep. No. 1002, 52d Cong., 1st Sess., 10, 12 (1892).

[16] According to the 1901 Regulations of the Interior Department, "Public forest reservations are established to protect and improve the forests for

Any doubt as to the relatively narrow purposes for which national forests were to be reserved is removed by comparing the broader language Congress used to authorize the establishment of national parks.[17] In 1916, Congress created the National Park Service and provided that the

> "fundamental purpose of the said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations." National Park Service Act of 1916, 39 Stat. 535, § 1, as amended, 16 U. S. C. § 1 (1976 ed.).[18]

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the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow." Department of Interior Circular, 30 L. D. 23, 24 (1900). Twelve years later, the Chief Forester also elaborated on the purposes of the national forests: "The National Forests are set aside specifically for the protection of water resources and the production of timber . . . . The aim of administration is essentially different from that of a national park, in which economic use of material resources comes second to the preservation of natural conditions on aesthetic grounds." U. S. Department of Agriculture, Report of the Forester 10–11 (1913).

[17] As Congressman McRae noted in introducing a predecessor bill to the 1897 Act, Congress was "not dealing with parks, but forest reservations, and there is a vast difference." 25 Cong. Rec. 2375 (1893).

[18] While in 1906 Congress transferred jurisdiction of the national forests to the Department of Agriculture, Transfer Act of 1905, 33 Stat. 628, national parks are exclusively under the jurisdiction of the Department of the Interior. This difference in jurisdiction again points up the limited purposes of the national forests, as explained in the House Report on the National Park Service Act:

"It was the unanimous opinion of the committee that there should not be any conflict of jurisdiction as between the departments [of the Interior and Agriculture] of such a nature as might interfere with the organization and operation of the national parks, which are set apart for the public enjoyment and entertainment, as against those reservations specifically created for the conservation of the natural resources of timber and other

When it was Congress' intent to maintain minimum instream flows within the confines of a national forest, it expressly so directed, as it did in the case of the Lake Superior National Forest:

> "In order to preserve the shore lines, rapids, waterfalls, beaches and other natural features of the region in an unmodified state of nature, no further alteration of the natural water level of any lake or stream . . . shall be authorized." 16 U. S. C. § 577b (1976 ed.).

National park legislation is not the only instructive comparison. In the Act of Mar. 10, 1934, 48 Stat. 400, 16 U. S. C. § 694 (1976 ed.), Congress authorized the establishment within individual national forests of fish and game sanctuaries, *but only with the consent of the state legislatures.* The Act specifically provided:

> "For the purpose of providing breeding places for game birds, game animals, and fish on lands and waters in the national forests not chiefly suitable for agriculture, the President of the United States is authorized, upon recommendation of the Secretary of Agriculture and the Secretary of Commerce *and with the approval of the State legislatures of the respective States in which said national forests are situated,* to establish by public proclamation certain specified and limited areas within said forests as fish and game sanctuaries or refuges which shall

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national assets, and devoted strictly to utilitarian purposes, in the vastly greater areas, known as national forests.

"The segregation of national-park areas necessarily involves the question of the preservation of nature as it exists, and the enjoyment of park privileges requires the development of adequate and moderate-priced transportation and hotel facilities. In the national forests there must always be kept in mind as primary objects and purposes the utilitarian use of land, of water, and of timber, as contributing to the wealth of all the people." H. R. Rep. No. 700, 64th Cong., 1st Sess., 3 (1916).

> be devoted to the increase of game birds, game animals, and fish of all kinds naturally adapted thereto." (Emphasis added.)

If, as the dissent contends, *post*, at 722, Congress in the Organic Administration Act of 1897 authorized the reservation of forests to "improve and protect" fish and wildlife, the 1934 Act would have been unnecessary. Nor is the dissent's position consistent with Congress' concern in 1934 that fish and wildlife preserves only be created "with the approval of the State legislatures."

As the dissent notes, in creating what would ultimately become Yosemite National Park, Congress in 1890 explicitly instructed the Secretary of the Interior to provide against the wanton destruction of fish and game inside the forest and against their taking "for the purposes of merchandise or profit." Act of Oct. 1, 1890, § 2, 26 Stat. 651. Congress also instructed the Secretary to protect all "the natural curiosities, or wonders within such reservation, . . . in their natural condition." By comparison, Congress in the 1897 Organic Act expressed no concern for the preservation of fish and wildlife within national forests generally. Nor is such a concern found in any of the comments made during the legislative debate on the 1897 Act. Cf. also H. R. 119, 54th Cong., 1st Sess., 28 Cong. Rec. 6410 (1896).[19]

B

Not only is the Government's claim that Congress intended to reserve water for recreation and wildlife preservation inconsistent with Congress' failure to recognize these goals as purposes of the national forests, it would defeat the very

[19] In comparing the 1897 Organic Act with enabling legislation for national parks and particular national forests, and with the Act of Mar. 10, 1934, we of course do not intimate any views as to what, if any, water Congress reserved under the latter statutes.

purpose for which Congress did create the national forest system.[20]

> "[F]orests exert a most important regulating influence upon the flow of rivers, reducing floods and increasing the water supply in the low stages. The importance of their conservation on the mountainous watersheds which collect the scanty supply for the arid regions of North America can hardly be overstated. With the natural regimen of the streams replaced by destructive floods in the spring, and by dry beds in the months when the irrigating flow is most needed, the irrigation of wide areas now proposed will be impossible, and regions now supporting prosperous communities will become depopulated." S. Doc. No. 105, 55th Cong., 1st Sess., 10 (1897).

The water that would be "insured" by preservation of the forest was to "be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." Organic Administration Act of 1897, 30 Stat. 36, 16 U. S. C.

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[20] It was the view of several of the Congressmen who spoke on the floor of the House that national forests were necessary "not to save the timber for future use so much as to preserve the water supply." 30 Cong. Rec. 1007 (1897) (Cong. Ellis). See also *id.*, at 1399 (Cong. Loud).

Congress has assured that the waters which flow through national forests are available for use by state appropriators by authorizing rights-of-way for ditches to carry the water to agricultural, domestic, mining, and milling uses. See Right-of-Way Permit Act of 1891, 43 U. S. C. § 946 *et seq.*; Right-of-Way Permit Act of 1901, 43 U. S. C. § 959; Forest Right-of-Way Act of 1905, 16 U. S. C. § 524 (repealed in part 1976). Congress has evidenced its continuing concern with enhancing the water supply for nonforest use by specifically authorizing the President to set aside and protect national forest lands needed as sources of municipal water supplies. Act of May 28, 1940, 54 Stat. 224, 16 U. S. C. § 552a (1976 ed.). See also Act of June 7, 1924, 16 U. S. C. § 570 (1976 ed.) (authorizing the purchase of private lands for inclusion in national forests where needed to protect "streams used for navigation or for irrigation").

§ 481 (1976 ed.). As this provision and its legislative history evidence, Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West. The Government, however, would have us now believe that Congress intended to partially defeat this goal by reserving significant amounts of water for purposes quite inconsistent with this goal.

C

In 1960, Congress passed the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U. S. C. § 528 *et seq.* (1976 ed.), which provides:

> "It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the [Organic Administration Act of 1897.]"

The Supreme Court of New Mexico concluded that this Act did not give rise to any reserved rights not previously authorized in the Organic Administration Act of 1897. "The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897." 90 N. M., at 413, 564 P. 2d, at 618. While we conclude that the Multiple-Use Sustained-Yield Act of 1960 was intended to broaden the purposes for which national forests had previously been administered, we agree that Congress did not intend to thereby expand the reserved rights of the United States.[21]

[21] The United States does not argue that the Multiple-Use Sustained-Yield Act of 1960 reserved additional water for use on the national forests. Instead, the Government argues that the Act confirms that Congress *always*

The Multiple-Use Sustained-Yield Act of 1960 establishes the purposes for which the national forests "*are* established and *shall* be administered." (Emphasis added.) The Act directs the Secretary of Agriculture to administer all forests, including those previously established, on a multiple-use and sustained-yield basis. H. R. 10572, 86th Cong., 2d Sess., 1 (1960). In the administration of the national forests, therefore, Congress intended the Multiple-Use Sustained-Yield Act of 1960 to broaden the benefits accruing from all reserved national forests.

The House Report accompanying the 1960 legislation, however, indicates that recreation, range, and "fish" purposes are "to be supplemental to, but not in derogation of, the purposes for which the national forests were established" in the Organic Administration Act of 1897.

> "The addition of the sentence to follow the first sentence in section 1 is to make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but is not in derogation of, the purposes of improving and protecting the forest or for securing favorable conditions of water flows and to furnish a continuous supply of timber as set out in the

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foresaw broad purposes for the national forests and authorized the Secretary of the Interior as early as 1897 to reserve water for recreational, aesthetic, and wildlife-preservation uses. Brief for United States 53–56. As the legislative history of the 1960 Act demonstrates, however, Congress believed that the 1897 Organic Administration Act only authorized the creation of national forests for two purposes—timber preservation and enhancement of water supply—and intended, through the 1960 Act, to *expand* the purposes for which the national forests should be administered. See, *e. g.*, H. R. Rep. No. 1551, 86th Cong., 2d Sess., 4 (1960).

Even if the 1960 Act expanded the reserved water rights of the United States, of course, the rights would be subordinate to any appropriation of water under state law dating to before 1960.

> cited provision of the act of June 4, 1897. Thus, in any establishment of a national forest a purpose set out in the 1897 act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act." H. R. Rep. No. 1551, 86th Cong., 2d Sess., 4 (1960).

As discussed earlier, the "reserved rights doctrine" is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas. Without legislative history to the contrary, we are led to conclude that Congress did not intend in enacting the Multiple-Use Sustained-Yield Act of 1960 to reserve water for the *secondary* purposes there established.[22] A reservation of additional water could mean a substantial loss in the amount of water available for irrigation and domestic use, thereby defeating Congress' principal purpose of securing favorable conditions of water flow. Congress intended the national forests to be administered for broader purposes after 1960 but there is no indication that it believed the new purposes to be so crucial as to require a reservation of additional water. By reaffirming the primacy of a favorable water flow, it indicated the opposite intent.

III

What we have said also answers the Government's contention that Congress intended to reserve water from the Rio

[22] We intimate no view as to whether Congress, in the 1960 Act, authorized the subsequent reservation of national forests out of public lands to which a broader doctrine of reserved water rights might apply.

Mimbres for stockwatering purposes. The United States issues permits to private cattle owners to graze their stock on the Gila National Forest and provides for stockwatering at various locations along the Rio Mimbres. The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree.

While Congress intended the national forests to be put to a variety of uses, including stockwatering, not inconsistent with the two principal purposes of the forests, stockwatering was not itself a direct purpose of reserving the land.[23] If stockwatering could not take place in the Gila National Forest, Congress' purposes in reserving the land would not be defeated. Congress, of course, did intend to secure favorable water flows, and one of the uses to which the enhanced water supply was intended to be placed was probably stockwatering. But Congress intended the water supply from the Rio Mimbres to

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[23] As discussed earlier, the national forests were not to be "set aside for non-use," 30 Cong. Rec. 966 (1897) (Cong. McRae), but instead to be opened up for any economic use not inconsistent with the forests' primary purposes. *Ibid.* One use that Congress foresaw was "pasturage." *Ibid.* See also *id.*, at 1006 (Cong. Ellis); *id.*, at 1011 (Cong. De Vries). As this Court has previously recognized, however, grazing was merely one use to which the national forests could possibly be put and would not be permitted where it might interfere with the specific purposes of the national forests including the securing of favorable conditions of water flow. Under the 1891 and 1897 forest Acts, "any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute." *United States* v. *Grimaud*, 220 U. S. 506, 515–516 (1911). See also *Light* v. *United States*, 220 U. S. 523 (1911).

be allocated among private appropriators under state law. 16 U. S. C. § 481 (1976 ed.).[24] There is no indication in the legislative histories of any of the forest Acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.

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[24] As noted earlier, the Organic Administration Act of 1897 specifically provided: "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, *or under the laws of the United States and the rules and regulations established thereunder.*" 30 Stat. 36, as amended, 16 U. S. C. § 481 (1976 ed.) (emphasis added). The United States, seizing on the italicized wording, contends that Congress intended the United States to allocate water to certain private users—in this case, cattle ranchers—outside of the structure of state water law. Contemporaneous Acts of Congress, however, preclude this construction of § 481.

In the same Act in which Congress first authorized the national forest system, Act of Mar. 3, 1891, § 18, 26 Stat. 1101, Congress provided for rights-of-way through the "public lands and *reservations*" for purposes of irrigation, *"Provided,* That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, . . . and *the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.*" (Emphasis added.) Contemporaneous administrative regulations reflected that the "control of the flow and use of the water" on federal reservations was "a matter exclusively under State or Territorial control." Department of Interior Circular, 18 L. D. 168, 169–170 (1894). See also *H. H. Sinclair,* 18 L. D. 573, 574 (1894). Only a few months before Congress passed the Organic Administration Act of 1897, Congress reaffirmed the state-law policy of the 1891 Act. In the Act of Feb. 26, 1897, ch. 335, 29 Stat. 599, Congress authorized the improvement and occupation of reservoir sites on public lands, *"Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate." As we noted in *California* v. *United States, ante,* at 661, it "was clearly the opinion of a majority of the Congressmen who spoke on the bill . . . that [this proviso] was unnecessary except out of an excess of cau-

IV

Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law. This intent is revealed in the purposes for which the national forest system was created and Congress' principled deference to state water law in the Organic Administration Act of 1897 and other legislation. The decision of the Supreme Court of New Mexico is faithful to this congressional intent and is therefore

Affirmed.

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting in part.

I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law. See *ante*, at 699, 701–702, 705. I also agree that the Organic Administration Act of 1897, 30 Stat. 11, cannot fairly be read as evidencing an intent to reserve water for recreational or stockwatering purposes in the national forests.[1]

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tion." It was their belief that, at least under the 1891 Act, the States had exclusive control of the distribution of water on public lands and reservations. *Ante*, at 661–662, and n. 16.

Contemporaneous administrative regulations of the officials responsible for administering the national forests confirm that the States were to have control of the distribution of water from streams flowing through the forests. In 1908, for example, the Forest Service began a policy of charging for the use of water, based upon the length of ditches, acreage flooded, and use of advantageous locations, but emphasized that the "water itself is granted by the State, not by the United States." 1906 Report of the Forester to the Secretary of Agriculture, H. R. Doc. No. 6, 59th Cong., 2d Sess., p. 273 (1907).

[1] I express no view as to the effect of the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U. S. C. § 528 *et seq.* (1976 ed.), on the

I do not agree, however, that the forests which Congress intended to "improve and protect" are the still, silent, lifeless places envisioned by the Court. In my view, the forests consist of the birds, animals, and fish—the wildlife—that inhabit them, as well as the trees, flowers, shrubs, and grasses. I therefore would hold that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants. I also add a word concerning the impact of the Court's holding today on future claims by the United States that the reservation of particular national forests impliedly reserved instream flows.

United States' reserved water rights in national forests that were established either before or after that Act's passage. Although the Court purports to hold that passage of the 1960 Act did not have the effect of reserving any additional water in then-existing forests, see *ante*, at 713–715, this portion of its opinion appears to be dicta. As the Court concedes, "[t]he United States does not argue that the Multiple-Use Sustained-Yield Act of 1960 reserved additional water for use on the national forests." *Ante*, at 713 n. 21. Likewise, the State argues only that "[n]o reserved rights for fish or wildlife can be implied in the Gila National Forest *prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960* . . . ." Brief for Respondent 44 (emphasis supplied); see also *id.*, at 1 ("questions presented"). Indeed, the State has gone so far as to suggest that passage of the 1960 Act may well have expanded the United States' reserved water rights in the national forests, presumably with a priority date for the additional reserved rights of 1960. See Brief in Opposition 16–17. Read in context, the New Mexico Supreme Court's statement that the 1960 Act "does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897," *Mimbres Valley Irrigation Co.* v. *Salopek*, 90 N. M. 410, 413, 564 P. 2d 615, 618 (1977), quoted *ante*, at 713, appears to mean nothing more than that the 1960 Act did not give the United States additional reserved water rights *with a priority date of before 1960*—a proposition with which I think we all would agree. Cf. *ante*, at 713–714, n. 21. But there never has been a question in this case as to whether the 1960 Act gave rise to additional reserved water rights with a priority date of 1960 or later in the Gila National Forest.

I

My analysis begins with the language of the statute. The Organic Administration Act of 1897, as amended, 16 U. S. C. § 475 (1976 ed.), provides in pertinent part:

> "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . ."

Although the language of the statute is not artful, a natural reading would attribute to Congress an intent to authorize the establishment of national forests for three purposes, not the two discerned by the Court. The New Mexico Supreme Court gave the statute its natural reading in this case when it wrote:

> "The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber." *Mimbres Valley Irrigation Co.* v. *Salopek*, 90 N. M. 410, 412, 564 P. 2d 615, 617 (1977).

Congress has given the statute the same reading, stating that under the Organic Administration Act of 1897 national forests may be established for "the purposes of improving and protecting the forest or for securing favorable conditions of water flows, and to furnish a continuous supply of timber . . . ." H. R. Rep. No. 1551, 86th Cong., 2d Sess., 4 (1960), quoted *ante*, at 714–715; accord, S. Rep. No. 1407, 86th Cong., 2d Sess., 4 (1960). See also Note, New Mexico's National Forests and the Implied Reservation Doctrine, 16 Natural Resources J. 975, 991–992 (1976).

"[T]he Court not surprisingly attempts to keep this provision in the background, addressing it only . . . in a footnote," *United States* v. *Sotelo*, 436 U. S. 268, 283 (1978) (REHN-

QUIST, J., dissenting), where it decides that the Act should be read as if it said national forests may "be created only 'to improve and protect the forest within the boundaries,' or, *in other words,* 'for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber.' " *Ante,* at 707 n. 14 (emphasis in original).[2] The Court then concludes that Congress did not mean to "improve and protect" any part of the forest except the usable timber and whatever other flora is necessary to maintain the watershed. This, however, is not what Congress said.

The Court believes that its "reading of the Act is confirmed by its legislative history." *Ibid.* The matter is not so clear to me. From early times in English law, the forest has included the creatures that live there. J. Manwood, A Treatise and Discourse of the Laws of the Forrest 1–7 (1598); 1 W. Blackstone, Commentaries *289. Although the English forest laws themselves were not transplanted to the shores of the new continent, see generally Lund, Early American Wildlife Law, 51 N. Y. U. L. Rev. 703 (1976), the understanding that the forest includes its wildlife has remained in the American mind. In establishing the first forest reservations, the year before passage of the Organic Act of 1891, Congress exhibited this understanding by directing the Secretary of the Interior to "provide against the wanton destruction of the fish . . . and game found within said reservation, and against their capture or destruction, for the purposes of merchandise or profit." Act of Oct. 1, 1890, § 2, 26 Stat. 651.[3]

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[2] In fact, the Court appears to show some ambivalence as to whether, in its view of the 1897 Act, national forests are to be reserved for two purposes, or only one. See *ante,* at 711–713.

[3] The Act cited is entitled "An act to set apart certain tracts of land in the State of California as *forest reservations.*" 26 Stat. 650 (emphasis supplied). Yosemite National Park was not carved out of the forest reserved by the 1890 Act until 1905. See Act of Feb. 7, 1905, 33 Stat. 702–703, 16 U. S. C. § 46 (1976 ed.). A portion of the land reserved by

Similarly, the bill introduced by Representative McRae in the 54th Congress, upon which the Court relies in construing the statute, *ante*, at 707–708, n. 14, directed the Secretary, "to preserve the timber and other natural resources, and such natural wonders and curiosities and game as may be therein, from injury, waste, fire, spoliation, or other destruction . . . ." H. R. 119, 54th Cong., 1st Sess., 28 Cong. Rec. 6410 (1896). The bill that became law in the 55th Congress substituted for this provision the independent "improve and protect the forest" clause together with a general direction that the Secretary "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction . . . ." Organic Administration Act of 1897, 30 Stat. 35, 16 U. S. C. § 551 (1976 ed.). Despite this rephrasing, Congress remained of the view that wildlife is part of the forest that it intended to "improve and protect" by passage of the 1897 Act, for in its first appropriation to implement the Act it directed that

> "forest agents, superintendents, supervisors, and all other persons employed in connection with the administration and protection of forest reservations shall in all ways that are practicable, aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game . . . ." Act of Mar. 3, 1899, 30 Stat. 1095.

See also Act of May 23, 1908, 35 Stat. 259, 16 U. S. C. § 553 (1976 ed.). This understanding has continued down to the present day. See, *e. g.*, Act of May 22, 1928, § 5, 45 Stat. 701, 16 U. S. C. § 581d (1976 ed.) (authorizing annual appropriations "[f]or such experiments and investigations as may be necessary in determining the life histories and habits of forest

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the 1890 Act remained a forest reserve and was designated the Sierra National Forest.

animals, birds, and wildlife"); Act of Mar. 29, 1944, § 1, 58 Stat. 132, 16 U. S. C. § 583 (1976 ed.) (authorizing the Secretary to establish sustained-yield units "in order to provide for a continuous and ample supply of forest products; and in order to secure the benefits of forests in maintenance of water supply, regulation of stream flow, prevention of soil erosion, amelioration of climate, *and preservation of wildlife* . . . .") (Emphasis supplied.) [4]

One may agree with the Court that Congress did not, by enactment of the Organic Administration Act of 1897, intend to authorize the creation of national forests simply to serve as wildlife preserves. But it does not follow from this that Congress did not consider wildlife to be part of the forest that it wished to "improve and protect" for future generations. It is inconceivable that Congress envisioned the forests it sought to preserve as including only inanimate components such as

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[4] The understanding that the forest includes the creatures that live there is confirmed by the modern view of the forest as an interdependent, dynamic community of plants and animals:

"The forest community, then, consists of an assemblage of plants and animals living in an environment of air, soil, and water. Each of these organisms is interrelated either directly or indirectly with virtually every other organism in the community. The health and welfare of the organisms are dependent upon the factors of the environment surrounding them; and the environment surrounding them itself is conditioned to a considerable degree by the biotic community itself. In other words, the plants, the animals, and the environment—including the air, the soil, and the water—constitute a complex ecological system in which each factor and each individual is conditioned by, and in itself conditions, the other factors comprising the complex." S. Spurr, Forest Ecology 155 (1964).

See also Gosz, Holmes, Likens, & Bormann, The Flow of Energy in a Forest Ecosystem, 238 Scientific American No. 3, pp. 92–102 (1978). Thus, it is doubtful whether the timber and watershed that the Court prizes so highly could flourish without a complement of wildlife. The recognition by modern science of this vital interdependence is by no means a new discovery. See J. Manwood, A Treatise and Discourse of the Laws of the Forrest 6 (1598).

the timber and flora. Insofar as the Court holds otherwise, the 55th Congress is maligned and the Nation is the poorer, and I dissent.[5]

II

Contrary to the Court's intimations, cf. *ante*, at 711–713, I see no inconsistency between holding that the United States impliedly reserved the right to instream flows, and what the Court views as the underlying purposes of the 1897 Act. The national forests can regulate the flow of water—which the Court views as "the very purpose for which Congress did create the national forest system," *ante*, at 711–712—only for the benefit of appropriators who are downstream from the reservation. The reservation of an instream flow is not a consumptive use; it does not subtract from the amount of water that is available to downstream appropriators. Reservation of an instream flow therefore would be perfectly consistent with the purposes of the 1897 Act as construed by the Court.[6]

I do not dwell on this point, however, for the Court's opinion cannot be read as holding that the United States never reserved instream flows when it set aside national forests under the 1897 Act. The State concedes, quite correctly on the Court's own theory, that even in this case "the United States

[5] No doubt it will be said that the waterflow necessary to maintain the watershed including the forest will be sufficient for the wildlife. This well may be true in most national forests and most situations. But the Court's opinion, as I read it, recognizes no reserved authority in the Federal Government to protect wildlife itself as a part of the forest, and therefore if and when the need for increased waterflow for this purpose arises the Federal Government would be powerless to act. Indeed, upstream appropriators could be allowed to divert so much water that survival of forest wildlife—including even the fish and other life in the streams—would be endangered.

[6] It is true that reservation of an instream flow might in some circumstances adversely affect appropriators upstream from the forest. There would be no inconsistency with the 1897 Act, however, for that Act manifestly was not intended to benefit upstream appropriators.

is not barred from asserting that rights to minimum instream flows might be necessary for erosion control or fire protection on the basis of the recognized purposes of watershed management and the maintenance of timber." Brief for Respondent 44 n. 11. Thus, if the United States proves, in this case or others, that the reservation of instream flows is necessary to fulfill the purposes discerned by the Court, I find nothing in the Court's opinion that bars it from asserting this right.

FEDERAL COMMUNICATIONS COMMISSION *v.* PACIFICA FOUNDATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-528. Argued April 18, 19, 1978—Decided July 3, 1978

A radio station of respondent Pacifica Foundation (hereinafter respondent) made an afternoon broadcast of a satiric monologue, entitled "Filthy Words," which listed and repeated a variety of colloquial uses of "words you couldn't say on the public airwaves." A father who heard the broadcast while driving with his young son complained to the Federal Communications Commission (FCC), which, after forwarding the complaint for comment to and receiving a response from respondent, issued a declaratory order granting the complaint. While not imposing formal sanctions, the FCC stated that the order would be "associated with the station's license file, and in the event subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." In its memorandum opinion, the FCC stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent radio broadcasts, and it advanced several reasons for treating that type of speech differently from other forms of expression. The FCC found a power to regulate indecent broadcasting, *inter alia*, in 18 U. S. C. § 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications." The FCC characterized the language of the monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to the law of nuisance where the "law generally speaks to *channeling* behavior rather than actually prohibiting it." The FCC found that certain words in the monologue depicted sexual and excretory activities in a particularly offensive manner, noted that they were broadcast in the early afternoon "when children are undoubtedly in the audience," and concluded that the language as broadcast was indecent and prohibited by § 1464. A three-judge panel of the Court of Appeals reversed, one judge concluding that the FCC's action was invalid either on the ground that the order constituted censorship, which was expressly forbidden by § 326 of the Communications Act of 1934, or on the ground that the FCC's opinion was the functional equivalent of

a rule, and as such was "overbroad." Another judge, who felt that § 326's censorship provision did not apply to broadcasts forbidden by § 1464, concluded that § 1464, construed narrowly as it has to be, covers only language that is obscene or otherwise unprotected by the First Amendment. The third judge, dissenting, concluded that the FCC had correctly condemned the daytime broadcast as indecent. Respondent contends that the broadcast was not indecent within the meaning of the statute because of the absence of prurient appeal. *Held:* The judgment is reversed. Pp. 734–741; 748–750; 761–762.

181 U. S. App. D. C. 132, 556 F. 2d 9, reversed.

MR. JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I–III and IV–C, finding:

1. The FCC's order was an adjudication under 5 U. S. C. § 554 (e) (1976 ed.), the character of which was not changed by the general statements in the memorandum opinion; nor did the FCC's action constitute rulemaking or the promulgation of regulations. Hence, the Court's review must focus on the FCC's determination that the monologue was indecent as broadcast. Pp. 734–735.

2. Section 326 does not limit the FCC's authority to sanction licensees who engage in obscene, indecent, or profane broadcasting. Though the censorship ban precludes editing proposed broadcasts in advance, the ban does not deny the FCC the power to review the content of completed broadcasts. Pp. 735–738.

3. The FCC was warranted in concluding that indecent language within the meaning of § 1464 was used in the challenged broadcast. The words "obscene, indecent, or profane" are in the disjunctive, implying that each has a separate meaning. Though prurient appeal is an element of "obscene," it is not an element of "indecent," which merely refers to noncomformance with accepted standards of morality. Contrary to respondent's argument, this Court in *Hamling* v. *United States,* 418 U. S. 87, has not foreclosed a reading of § 1464 that authorizes a proscription of "indecent" language that is not obscene, for the statute involved in that case, unlike § 1464, focused upon the prurient, and dealt primarily with printed matter in sealed envelopes mailed from one individual to another, whereas § 1464 deals with the content of public broadcasts. Pp. 738–741.

4. Of all forms of communication, broadcasting has the most limited First Amendment protection. Among the reasons for specially treating indecent broadcasting is the uniquely pervasive presence that medium of expression occupies in the lives of our people. Broadcasts extend into the privacy of the home and it is impossible completely to avoid

those that are patently offensive. Broadcasting, moreover, is uniquely accessible to children. Pp. 748–750.

MR. JUSTICE STEVENS, joined by THE CHIEF JUSTICE, and MR. JUSTICE REHNQUIST, concluded in Parts IV–A and IV–B:

1. The FCC's authority to proscribe this particular broadcast is not invalidated by the possibility that its construction of the statute may deter certain hypothetically protected broadcasts containing patently offensive references to sexual and excretory activities. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367. Pp. 742–743.

2. The First Amendment does not prohibit all governmental regulation that depends on the content of speech. *Schenck* v. *United States*, 249 U. S. 47, 52. The content of respondent's broadcast, which was "vulgar," "offensive," and "shocking," is not entitled to absolute constitutional protection in all contexts; it is therefore necessary to evaluate the FCC's action in light of the context of that broadcast. Pp. 744–748.

MR. JUSTICE POWELL, joined by MR. JUSTICE BLACKMUN, concluded that the FCC's holding does not violate the First Amendment, though, being of the view that Members of this Court are not free generally to decide on the basis of its content which speech protected by the First Amendment is most valuable and therefore deserving of First Amendment protection, and which is less "valuable" and hence less deserving of protection, he is unable to join Part IV–B (or IV–A) of the opinion. Pp. 761–762.

STEVENS, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I–III and IV–C, in which BURGER, C. J., and REHNQUIST, J., joined, and in all but Parts IV–A and IV–B of which BLACKMUN and POWELL, JJ., joined, and an opinion as to Parts IV–A and IV–B, in which BURGER, C. J., and REHNQUIST, J., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 755. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 762. STEWART, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, *post*, p. 777.

Joseph A. Marino argued the cause for petitioner. With him on the briefs were *Robert R. Bruce* and *Daniel M. Armstrong*.

Harry M. Plotkin argued the cause for respondent Pacifica Foundation. With him on the brief were *David Tillotson* and *Harry F. Cole*. *Louis F. Claiborne* argued the cause for

the United States, a respondent under this Court's Rule 21 (4). With him on the brief were *Solicitor General McCree, Assistant Attorney General Civiletti,* and *Jerome M. Feit.**

MR. JUSTICE STEVENS delivered the opinion of the Court (Parts I, II, III, and IV–C) and an opinion in which THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST joined (Parts IV–A and IV–B).

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, which is appended to this opinion, indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica

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*Briefs of *amici curiae* urging reversal were filed by *Anthony H. Atlas* for Morality in Media, Inc.; and by *George E. Reed* and *Patrick F. Geary* for the United States Catholic Conference.

Briefs of *amici curiae* urging affirmance were filed by *J. Roger Wollenberg, Timothy B. Dyk, James A. McKenna, Jr., Carl R. Ramey, Erwin G. Krasnow, Floyd Abrams, J. Laurent Scharff, Corydon B. Dunham,* and *Howard Monderer* for the American Broadcasting Companies, Inc., et al.; by *Henry R. Kaufman, Joel M. Gora, Charles Sims,* and *Bruce J. Ennis* for the American Civil Liberties Union et al.; by *Irwin Karp* for the Authors League of America, Inc.; by *James Bouras, Barbara Scott,* and *Fritz E. Attaway* for the Motion Picture Association of America, Inc.; and by *Paul P. Selvin* for the Writers Guild of America, West, Inc.

Charles M. Firestone filed a brief for the Committee for Open Media as *amicus curiae.*

Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that, immediately before its broadcast, listeners had been advised that it included "sensitive language which might be regarded as offensive to some." Pacifica characterized George Carlin as "a significant social satirist" who "like Twain and Sahl before him, examines the language of ordinary people. . . . Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." Pacifica stated that it was not aware of any other complaints about the broadcast.

On February 21, 1975, the Commission issued a declaratory order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions." 56 F. C. C. 2d 94, 99. The Commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." [1]

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[1] 56 F. C. C. 2d, at 99. The Commission noted:

"Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U. S. C. [§§] 312 (a), 312 (b), 503 (b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U. S. C. [§§] 307, 308." *Id.*, at 96 n. 3.

In its memorandum opinion the Commission stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. *Id.*, at 94. Advancing several reasons for treating broadcast speech differently from other forms of expression,[2] the Commission found a power to regulate indecent broadcasting in two statutes: 18 U. S. C. § 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications," [3] and 47 U. S. C. § 303 (g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest." [4]

The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the "law generally speaks to *channeling* behavior more than actually prohibiting it. . . . [T]he con-

[2] "Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children." *Id.*, at 97.

[3] Title 18 U. S. C. § 1464 (1976 ed.) provides:

"Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[4] Section 303 (g) of the Communications Act of 1934, 48 Stat. 1082, as amended, as set forth in 47 U. S. C. § 303 (g), in relevant part, provides:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . . . . .

"(g) . . . generally encourage the larger and more effective use of radio in the public interest."

cept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." 56 F. C. C. 2d, at 98.[5]

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (i. e., in the early afternoon)," and that the prerecorded language, with these offensive words "repeated over and over," was "deliberately broadcast." *Id.*, at 99. In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U. S. C. [§] 1464."[6] *Ibid.*

After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that

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[5] Thus, the Commission suggested, if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience. 56 F. C. C. 2d, at 98.

[6] Chairman Wiley concurred in the result without joining the opinion. Commissioners Reid and Quello filed separate statements expressing the opinion that the language was inappropriate for broadcast at any time. *Id.*, at 102–103. Commissioner Robinson, joined by Commissioner Hooks, filed a concurring statement expressing the opinion: "[W]e can regulate offensive speech to the extent it constitutes a public nuisance. . . . The governing idea is that 'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct. . . . If I were called on to do so, I would find that Carlin's monologue, if it were broadcast at an appropriate hour and accompanied by suitable warning, was distinguished by sufficient literary value to avoid being 'indecent' within the meaning of the statute." *Id.*, at 107–108, and n. 9.

it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." 59 F. C. C. 2d 892 (1976). The Commission noted that its "declaratory order was issued in a specific factual context," and declined to comment on various hypothetical situations presented by the petition.[7] *Id.*, at 893. It relied on its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them." *Ibid.*

The United States Court of Appeals for the District of Columbia Circuit reversed, with each of the three judges on the panel writing separately. 181 U. S. App. D. C. 132, 556 F. 2d 9. Judge Tamm concluded that the order represented censorship and was expressly prohibited by § 326 of the Communications Act.[8] Alternatively, Judge Tamm read the Commission opinion as the functional equivalent of a rule and concluded that it was "overbroad." 181 U. S. App. D. C., at 141, 556 F. 2d, at 18. Chief Judge Bazelon's concurrence rested on the Constitution. He was persuaded that § 326's prohibition against censorship is inapplicable to broadcasts forbidden by § 1464. However, he concluded that § 1464

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[7] The Commission did, however, comment:

"'[I]n some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.' Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language. . . . We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 59 F. C. C. 2d, at 893 n. 1.

[8] "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 48 Stat. 1091, 47 U. S. C. § 326.

must be narrowly construed to cover only language that is obscene or otherwise unprotected by the First Amendment. 181 U. S. App. D. C., at 140–153, 556 F. 2d, at 24–30. Judge Leventhal, in dissent, stated that the only issue was whether the Commission could regulate the language *"as broadcast." Id.*, at 154, 556 F. 2d, at 31. Emphasizing the interest in protecting children, not only from exposure to indecent language, but also from exposure to the idea that such language has official approval, *id.*, at 160, and n. 18, 556 F. 2d, at 37, and n. 18, he concluded that the Commission had correctly condemned the daytime broadcast as indecent.

Having granted the Commission's petition for certiorari, 434 U. S. 1008, we must decide: (1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent "as broadcast"; (2) whether the Commission's order was a form of censorship forbidden by § 326; (3) whether the broadcast was indecent within the meaning of § 1464; and (4) whether the order violates the First Amendment of the United States Constitution.

I

The general statements in the Commission's memorandum opinion do not change the character of its order. Its action was an adjudication under 5 U. S. C. § 554 (e) (1976 ed.); it did not purport to engage in formal rulemaking or in the promulgation of any regulations. The order "was issued in a specific factual context"; questions concerning possible action in other contexts were expressly reserved for the future. The specific holding was carefully confined to the monologue "as broadcast."

"This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297. That admonition has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–569. However appro-

priate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions. See *Herb* v. *Pitcairn*, 324 U. S. 117, 126. Accordingly, the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast.

II

The relevant statutory questions are whether the Commission's action is forbidden "censorship" within the meaning of 47 U. S. C. § 326 and whether speech that concededly is not obscene may be restricted as "indecent" under the authority of 18 U. S. C. § 1464 (1976 ed.). The questions are not unrelated, for the two statutory provisions have a common origin. Nevertheless, we analyze them separately.

Section 29 of the Radio Act of 1927 provided:

> "Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication." 44 Stat. 1172.

The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties.[9]

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[9] Zechariah Chafee, defending the Commission's authority to take into account program service in granting licenses, interpreted the restriction on

During the period between the original enactment of the provision in 1927 and its re-enactment in the Communications Act of 1934, the courts and the Federal Radio Commission held that the section deprived the Commission of the power to subject "broadcasting matter to scrutiny prior to its release," but they concluded that the Commission's "undoubted right" to take note of past program content when considering a licensee's renewal application "is not censorship." [10]

"censorship" narrowly: "This means, I feel sure, the sort of censorship which went on in the seventeenth century in England—the deletion of specific items and dictation as to what should go into particular programs." 2 Z. Chafee, Government and Mass Communications 641 (1947).

[10] In *KFKB Broadcasting Assn.* v. *Federal Radio Comm'n*, 60 App. D. C. 79, 47 F. 2d 670 (1931), a doctor who controlled a radio station as well as a pharmaceutical association made frequent broadcasts in which he answered the medical questions of listeners. He often prescribed mixtures prepared by his pharmaceutical association. The Commission determined that renewal of the station's license would not be in the public interest, convenience, or necessity because many of the broadcasts served the doctor's private interests. In response to the claim that this was censorship in violation of § 29 of the 1927 Act, the Court held:

"This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship." 60 App. D. C., at 81, 47 F. 2d, at 672.

In *Trinity Methodist Church, South* v. *Federal Radio Comm'n*, 61 App. D. C. 311, 62 F. 2d 850 (1932), cert. denied, 288 U. S. 599, the station was controlled by a minister whose broadcasts contained frequent references to "pimps" and "prostitutes" as well as bitter attacks on the Roman Catholic Church. The Commission refused to renew the license, citing the nature of the broadcasts. The Court of Appeals affirmed, concluding that First Amendment concerns did not prevent the Commission from regulating broadcasts that "offend the religious susceptibilities of thousands . . . or offend youth and innocence by the free use of words suggestive of sexual immorality." 61 App. D. C., at 314, 62 F. 2d, at 853. The court recognized that the licensee had a right to broadcast this material free of prior

Not only did the Federal Radio Commission so construe the statute prior to 1934; its successor, the Federal Communications Commission, has consistently interpreted the provision in the same way ever since. See Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964). And, until this case, the Court of Appeals for the District of Columbia Circuit has consistently agreed with this construction.[11] Thus, for example, in his opinion in *Anti-Defamation League of B'nai B'rith* v. *FCC*, 131 U. S. App. D. C. 146, 403 F. 2d 169 (1968), cert. denied, 394 U. S. 930, Judge Wright forcefully pointed out that the Commission is not prevented from canceling the license of a broadcaster who persists in a course of improper programming. He explained:

> "This would not be prohibited 'censorship,' . . . any more than would the Commission's considering on a license renewal application whether a broadcaster allowed 'coarse, vulgar, suggestive, double-meaning' programming; programs containing such material are grounds for denial of a license renewal." 131 U. S. App. D. C., at 150–151, n. 3, 403 F. 2d, at 173–174, n. 3.

See also *Office of Communication of United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 359 F. 2d 994 (1966).

Entirely apart from the fact that the subsequent review of program content is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent, or profane language. A single section of the 1927 Act is the source of both

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restraint, but "this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it." *Id.*, at 312, 62 F. 2d, at 851.

[11] See, *e. g.*, *Bay State Beacon, Inc.* v. *FCC*, 84 U. S. App. D. C. 216, 171 F. 2d 826 (1948); *Idaho Microwave, Inc.* v. *FCC*, 122 U. S. App. D. C. 253, 352 F. 2d 729 (1965); *National Assn. of Theatre Owners* v. *FCC*, 136 U. S. App. D. C. 352, 420 F. 2d 194 (1969), cert. denied, 397 U. S. 922.

the anticensorship provision and the Commission's authority to impose sanctions for the broadcast of indecent or obscene language. Quite plainly, Congress intended to give meaning to both provisions. Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.

There is nothing in the legislative history to contradict this conclusion. The provision was discussed only in generalities when it was first enacted.[12] In 1934, the anticensorship provision and the prohibition against indecent broadcasts were re-enacted in the same section, just as in the 1927 Act. In 1948, when the Criminal Code was revised to include provisions that had previously been located in other Titles of the United States Code, the prohibition against obscene, indecent, and profane broadcasts was removed from the Communications Act and re-enacted as § 1464 of Title 18. 62 Stat. 769 and 866. That rearrangement of the Code cannot reasonably be interpreted as having been intended to change the meaning of the anticensorship provision. H. R. Rep. No. 304, 80th Cong., 1st Sess., A106 (1947). Cf. *Tidewater Oil Co.* v. *United States*, 409 U. S. 151, 162.

We conclude, therefore, that § 326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.

III

The only other statutory question presented by this case is whether the afternoon broadcast of the "Filthy Words"

[12] See, *e. g.*, 67 Cong. Rec. 12615 (1926) (remarks of Sen. Dill); *id.*, at 5480 (remarks of Rep. White); 68 Cong. Rec. 2567 (1927) (remarks of Rep. Scott); Hearings on S. 1 and S. 1754 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., 121 (1926); Hearings on H. R. 5589 before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess., 26 and 40 (1926). See also Hearings on H. R. 8825 before the House Committee on the Merchant Marine and Fisheries, 70th Cong., 1st Sess., *passim* (1928).

monologue was indecent within the meaning of § 1464.[13] Even that question is narrowly confined by the arguments of the parties.

The Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent. Pacifica takes issue with the Commission's definition of indecency, but does not dispute the Commission's preliminary determination that each of the components of its definition was present. Specifically, Pacifica does not quarrel with the conclusion that this afternoon broadcast was patently offensive. Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of prurient appeal.

The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are

[13] In addition to § 1464, the Commission also relied on its power to regulate in the public interest under 47 U. S. C. § 303 (g). We do not need to consider whether § 303 may have independent significance in a case such as this. The statutes authorizing civil penalties incorporate § 1464, a criminal statute. See 47 U. S. C. §§ 312 (a)(6), 312 (b)(2), and 503 (b)(1)(E) (1970 ed. and Supp. V). But the validity of the civil sanctions is not linked to the validity of the criminal penalty. The legislative history of the provisions establishes their independence. As enacted in 1927 and 1934, the prohibition on indecent speech was separate from the provisions imposing civil and criminal penalties for violating the prohibition. Radio Act of 1927, §§ 14, 29, and 33, 44 Stat. 1168 and 1173; Communications Act of 1934, §§ 312, 326, and 501, 48 Stat. 1086, 1091, and 1100, 47 U. S. C. §§ 312, 326, and 501 (1970 ed. and Supp. V). The 1927 and 1934 Acts indicated in the strongest possible language that any invalid provision was separable from the rest of the Act. Radio Act of 1927, § 38, 44 Stat. 1174; Communications Act of 1934, § 608, 48 Stat. 1105, 47 U. S. C. § 608. Although the 1948 codification of the criminal laws and the addition of new civil penalties changes the statutory structure, no substantive change was apparently intended. Cf. *Tidewater Oil Co.* v. *United States*, 409 U. S. 151, 162. Accordingly, we need not consider any question relating to the possible application of § 1464 as a criminal statute.

written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality.[14]

Pacifica argues, however, that this Court has construed the term "indecent" in related statutes to mean "obscene," as that term was defined in *Miller* v. *California*, 413 U. S. 15. Pacifica relies most heavily on the construction this Court gave to 18 U. S. C. § 1461 in *Hamling* v. *United States*, 418 U. S. 87. See also *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 130 n. 7 (18 U. S. C. § 1462) (dicta). *Hamling* rejected a vagueness attack on § 1461, which forbids the mailing of "obscene, lewd, lascivious, indecent, filthy or vile" material. In holding that the statute's coverage is limited to obscenity, the Court followed the lead of Mr. Justice Harlan in *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478. In that case, Mr. Justice Harlan recognized that § 1461 contained a variety of words with many shades of meaning.[15] Nonetheless, he thought that the phrase "obscene, lewd, lascivious, indecent, filthy or vile," taken as a whole, was clearly limited to the obscene, a reading well grounded in prior judicial constructions: "[T]he statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex." 370 U. S., at 483. In *Hamling* the Court agreed with Mr. Justice Harlan that § 1461 was meant only to regulate obscenity in the mails; by reading into it the limits set by *Miller* v. *California, supra*, the Court adopted a construction which assured the statute's constitutionality.

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[14] Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . . ." Webster's Third New International Dictionary (1966).

[15] Indeed, at one point, he used "indecency" as a shorthand term for "patent offensiveness," 370 U. S., at 482, a usage strikingly similar to the Commission's definition in this case. 56 F. C. C. 2d, at 98.

The reasons supporting *Hamling*'s construction of § 1461 do not apply to § 1464. Although the history of the former revealed a primary concern with the prurient, the Commission has long interpreted § 1464 as encompassing more than the obscene.[16] The former statute deals primarily with printed matter enclosed in sealed envelopes mailed from one individual to another; the latter deals with the content of public broadcasts. It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means.[17]

Because neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction of the statute. When that construction is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast.

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[16] " '[W]hile a nudist magazine may be within the protection of the First Amendment . . . the televising of nudes might well raise a serious question of programming contrary to 18 U. S. C. § 1464. . . . Similarly, regardless of whether the "4-letter words" and sexual description, set forth in *"lady Chatterly's Lover,"* (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and section 1464 questions.' " *Enbanc Programing Inquiry*, 44 F. C. C. 2303, 2307 (1960). See also *In re WUHY–FM*, 24 F. C. C. 2d 408, 412 (1970); *In re Sonderling Broadcasting Corp.*, 27 R. R. 2d 285, on reconsideration, 41 F. C. C. 2d 777 (1973), aff'd on other grounds *sub nom. Illinois Citizens Committee for Broadcasting* v. *FCC*, 169 U. S. App. D. C. 166, 515 F. 2d 397 (1974); *In re Mile High Stations, Inc.*, 28 F. C. C. 795 (1960); *In re Palmetto Broadcasting Co.*, 33 F. C. C. 250 (1962), reconsideration denied, 34 F. C. C. 101 (1963), aff'd on other grounds *sub nom. Robinson* v. *FCC*, 118 U. S. App. D. C. 144, 334 F. 2d 534 (1964), cert. denied, 379 U. S. 843.

[17] This conclusion is reinforced by noting the different constitutional limits on Congress' power to regulate the two different subjects. Use of the postal power to regulate material that is not fraudulent or obscene

IV

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

A

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was "issued in a specific factual context." 59 F. C. C. 2d, at 893. That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context—it cannot be adequately judged in the abstract.

The approach is also consistent with *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367. In that case the Court rejected an argument that the Commission's regulations defining the fairness doctrine were so vague that they would inevitably abridge the broadcasters' freedom of speech. The Court of Appeals had invalidated the regulations because their vagueness might lead to self-censorship of controversial program

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raises "grave constitutional questions." *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156. But it is well settled that the First Amendment has a special meaning in the broadcasting context. See, *e. g.*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775; *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94. For this reason, the presumption that Congress never intends to exceed constitutional limits, which supported *Hamling*'s narrow reading of § 1461, does not support a comparable reading of § 1464.

content. *Radio Television News Directors Assn.* v. *United States,* 400 F. 2d 1002, 1016 (CA7 1968). This Court reversed. After noting that the Commission had indicated, as it has in this case, that it would not impose sanctions without warning in cases in which the applicability of the law was unclear, the Court stated:

> "We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan,* 332 U. S. 689, 694 (1948), but will deal with those problems if and when they arise." 395 U. S., at 396.

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities.[18] While some of these references may be protected, they surely lie at the periphery of First Amendment concern. Cf. *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 380–381. *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50, 61. The danger dismissed so summarily in *Red Lion,* in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." *Broadrick* v. *Oklahoma,* 413 U. S. 601, 613. We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

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[18] A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

B

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances.[19] For if the government has any such power, this was an appropriate occasion for its exercise.

The words of the Carlin monologue are unquestionably "speech" within the meaning of the First Amendment. It is equally clear that the Commission's objections to the broadcast were based in part on its content. The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.

The classic exposition of the proposition that both the content and the context of speech are critical elements of First Amendment analysis is Mr. Justice Holmes' statement for the Court in *Schenck* v. *United States*, 249 U. S. 47, 52:

> "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words

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[19] Pacifica's position would, of course, deprive the Commission of any power to regulate erotic telecasts unless they were obscene under *Miller* v. *California*, 413 U. S. 15. Anything that could be sold at a newsstand for private examination could be publicly displayed on television.

We are assured by Pacifica that the free play of market forces will discourage indecent programming. "Smut may," as Judge Leventhal put it, "drive itself from the market and confound Gresham," 181 U. S. App. D. C., at 158, 556 F. 2d, at 35; the prosperity of those who traffic in pornographic literature and films would appear to justify skepticism.

> that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Other distinctions based on content have been approved in the years since *Schenck*. The government may forbid speech calculated to provoke a fight. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. It may pay heed to the " 'commonsense differences' between commercial speech and other varieties." *Bates* v. *State Bar of Arizona*, *supra*, at 381. It may treat libels against private citizens more severely than libels against public officials. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323. Obscenity may be wholly prohibited. *Miller* v. *California*, 413 U. S. 15. And only two Terms ago we refused to hold that a "statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment." *Young* v. *American Mini Theatres, Inc.*, *supra*, at 52.

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content.[20] Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. *Roth* v. *United States*, 354 U. S. 476. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of

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[20] Although neither MR. JUSTICE POWELL nor MR. JUSTICE BRENNAN directly confronts this question, both have answered it affirmatively, the latter explicitly, *post*, at 768 n. 3, and the former implicitly by concurring in a judgment that could not otherwise stand.

ideas.[21] If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words [22]—First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends.[23] Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S., at 572.

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. See, *e. g.*, *Hess* v. *Indiana*, 414 U. S. 105. Indeed, we may assume, *arguendo*, that this monologue would be protected in other contexts. None-

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[21] See, *e. g.*, *Madison School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175–176; *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765.

[22] The monologue does present a point of view; it attempts to show that the words it uses are "harmless" and that our attitudes toward them are "essentially silly." See *supra*, at 730. The Commission objects, not to this point of view, but to the way in which it is expressed. The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.

[23] The Commission stated: "Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions . . . ." 56 F. C. C. 2d, at 98. Our society has a tradition of performing certain bodily functions in private, and of severely limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure.

theless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context.[24] It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. Cf. *Cohen* v. *California*, 403 U. S. 15, 25.[25]

In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its

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[24] With respect to other types of speech, the Court has tailored its protection to both the abuses and the uses to which it might be put. See, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (special scienter rules in libel suits brought by public officials); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (government may strictly regulate truthfulness in commercial speech). See also *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 82 n. 6 (POWELL, J., concurring).

[25] The importance of context is illustrated by the *Cohen* case. That case arose when Paul Cohen entered a Los Angeles courthouse wearing a jacket emblazoned with the words "Fuck the Draft." After entering the courtroom, he took the jacket off and folded it. 403 U. S., at 19 n. 3. So far as the evidence showed, no one in the courthouse was offended by his jacket. Nonetheless, when he left the courtroom, Cohen was arrested, convicted of disturbing the peace, and sentenced to 30 days in prison.

In holding that criminal sanctions could not be imposed on Cohen for his political statement in a public place, the Court rejected the argument that his speech would offend unwilling viewers; it noted that "there was no evidence that persons powerless to avoid [his] conduct did in fact object to it." *Id.*, at 22. In contrast, in this case the Commission was responding to a listener's strenuous complaint, and Pacifica does not question its determination that this afternoon broadcast was likely to offend listeners. It should be noted that the Commission imposed a far more moderate penalty on Pacifica than the state court imposed on Cohen. Even the strongest civil penalty at the Commission's command does not include criminal prosecution. See n. 1, *supra*.

context in order to determine whether the Commission's action was constitutionally permissible.

C

We have long recognized that each medium of expression presents special First Amendment problems. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502–503. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." [26] Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367.

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. *Rowan* v. *Post Office Dept.*, 397 U. S. 728. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he

[26] 47 U. S. C. §§ 309 (a), 312 (a)(2); *FCC* v. *WOKO, Inc.*, 329 U. S. 223, 229. Cf. *Shuttlesworth* v. *Birmingham*, 394 U. S. 147; *Staub* v. *Baxley*, 355 U. S. 313.

hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.[27]

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg* v. *New York*, 390 U. S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression.

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[27] Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away. See *Erznoznik* v. *Jacksonville*, 422 U. S. 205. As we noted in *Cohen* v. *California*:

"While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . , we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.'" 403 U. S., at 21.

The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "plac[ing] telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from "us[ing] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act Amendments, 91 Stat. 877, 15 U. S. C. § 1692d (1976 ed., Supp. II).

Id., at 640 and 639.[28] The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience,[29] and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise

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[28] The Commission's action does not by any means reduce adults to hearing only what is fit for children. Cf. *Butler* v. *Michigan*, 352 U. S. 380, 383. Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words. In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort; whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided.

[29] Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected by passages such as: "And prively he caughte hire by the queynte." The Canterbury Tales, Chaucer's Complete Works (Cambridge ed. 1933), p. 58, l. 3276.

of its regulatory power does not depend on proof that the pig is obscene.

The judgment of the Court of Appeals is reversed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

The following is a verbatim transcript of "Filthy Words" prepared by the Federal Communications Commission.

Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, [']cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever, [']cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it

doesn't really—it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, [']cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy. I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here,

will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola. (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always like that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. ['] Cause in a lot of cases that's the very act that

hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuck (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to FUCK OF THE MOUNTAIN. (laughter) It's an interesting word too, [']cause it's got a double kind of a life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love. (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you have toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you. (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter)

['] Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list. I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your *ass*. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh space travelers. Thank you man for tonight and thank you also. (clapping whistling)

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

I join Parts I, II, III, and IV–C of MR. JUSTICE STEVENS' opinion. The Court today reviews only the Commission's holding that Carlin's monologue was indecent "as broadcast"

at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion. *Ante*, at 734–735. In addition to being consistent with our settled practice of not deciding constitutional issues unnecessarily, see *ante*, at 734; *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring), this narrow focus also is conducive to the orderly development of this relatively new and difficult area of law, in the first instance by the Commission, and then by the reviewing courts. See 181 U. S. App. D. C. 132, 158–160, 556 F. 2d 9, 35–37 (1977) (Leventhal, J., dissenting).

I also agree with much that is said in Part IV of MR. JUSTICE STEVENS' opinion, and with its conclusion that the Commission's holding in this case does not violate the First Amendment. Because I do not subscribe to all that is said in Part IV, however, I state my views separately.

I

It is conceded that the monologue at issue here is not obscene in the constitutional sense. See 56 F. C. C. 2d 94, 98 (1975); Brief for Petitioner 18. Nor, in this context, does its language constitute "fighting words" within the meaning of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Some of the words used have been held protected by the First Amendment in other cases and contexts. *E. g.*, *Lewis* v. *New Orleans*, 415 U. S. 130 (1974); *Hess* v. *Indiana*, 414 U. S. 105 (1973); *Papish* v. *University of Missouri Curators*, 410 U. S. 667 (1973); *Cohen* v. *California*, 403 U. S. 15 (1971); see also *Eaton* v. *Tulsa*, 415 U. S. 697 (1974). I do not think Carlin, consistently with the First Amendment, could be punished for delivering the same monologue to a live audience composed of adults who, knowing what to expect, chose to attend his performance. See *Brown* v. *Oklahoma*, 408 U. S. 914 (1972) (POWELL, J., concurring in result). And I would assume that an adult could not constitutionally be prohibited from purchasing a recording or transcript of the monologue

and playing or reading it in the privacy of his own home. Cf. *Stanley* v. *Georgia*, 394 U. S. 557 (1969).

But it also is true that the language employed is, to most people, vulgar and offensive. It was chosen specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment. The Commission did not err in characterizing the narrow category of language used here as "patently offensive" to most people regardless of age.

The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. See 56 F. C. C. 2d, at 98. In my view, this consideration provides strong support for the Commission's holding.[1]

The Court has recognized society's right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 212 (1975); see also, *e. g.*, *Miller* v. *California*, 413 U. S. 15, 36 n. 17 (1973); *Ginsberg* v. *New York*, 390 U. S. 629, 636–641 (1968); *Jacobellis* v. *Ohio*, 378 U. S. 184, 195 (1964) (opinion of BRENNAN, J.). This recognition stems in large part from the fact that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York*, *supra*, at 649–650 (STEWART, J., concurring in result). Thus, children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling

[1] See generally Judge Leventhal's thoughtful opinion in the Court of Appeals. 181 U. S. App. D. C. 132, 155–158, 556 F. 2d 9, 32–35 (1977) (dissenting opinion).

through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult. For these reasons, society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat:

> "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince* v. *Massachusetts,* [321 U. S. 158, 166 (1944)]. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.,* at 639.

The Commission properly held that the speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest. The language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts.

In most instances, the dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access. See *id.,* at 634–635. The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching

children. This, as the Court emphasizes, is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for First Amendment purposes. See *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 384 (1977); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 101 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 386–387 (1969); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (DC 1971), aff'd *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U. S. 1000 (1972); see generally *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502–503 (1952). In my view, the Commission was entitled to give substantial weight to this difference in reaching its decision in this case.

A second difference, not without relevance, is that broadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. *Erznoznik* v. *Jacksonville, supra*, at 209; *Cohen* v. *California*, 403 U. S., at 21; *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970). Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, see, *e. g., Erznoznik, supra*, at 210–211, but cf. *Rosenfeld* v. *New Jersey*, 408 U. S. 901, 903–909 (1972) (POWELL, J., dissenting), a different order of values obtains in the home. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Rowan* v. *Post Office Dept., supra*, at 738. The Commission also was entitled to give this factor appropriate weight in the circumstances of the instant case. This is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect

unwilling adults from momentary exposure to it in their homes.[2] Making the sensitive judgments required in these cases is not easy. But this responsibility has been reposed initially in the Commission, and its judgment is entitled to respect.

It is argued that despite society's right to protect its children from this kind of speech, and despite everyone's interest in not being assaulted by offensive speech in the home, the Commission's holding in this case is impermissible because it prevents willing adults from listening to Carlin's monologue over the radio in the early afternoon hours. It is said that this ruling will have the effect of "reduc[ing] the adult population . . . to [hearing] only what is fit for children." *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957). This argument is not without force. The Commission certainly should consider it as it develops standards in this area. But it is not sufficiently strong to leave the Commission powerless to act in circumstances such as those in this case.

The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion. On its face, it does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the contemporary use of language at any time during the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated

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[2] It is true that the radio listener quickly may tune out speech that is offensive to him. In addition, broadcasters may preface potentially offensive programs with warnings. But such warnings do not help the unsuspecting listener who tunes in at the middle of a program. In this respect, too, broadcasting appears to differ from books and records, which may carry warnings on their face, and from motion pictures and live performances, which may carry warnings on their marquees.

use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here. In short, I agree that on the facts of this case, the Commission's order did not violate respondent's First Amendment rights.

II

As the foregoing demonstrates, my views are generally in accord with what is said in Part IV–C of MR. JUSTICE STEVENS' opinion. See *ante*, at 748–750. I therefore join that portion of his opinion. I do not join Part IV–B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection. Compare *ante*, at 744–748; *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63–73 (1976) (opinion of STEVENS, J.), with *id.*, at 73 n. 1 (POWELL, J., concurring).[3] In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.[4]

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[3] The Court has, however, created a limited exception to this rule in order to bring commercial speech within the protection of the First Amendment. See *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978).

[4] For much the same reason, I also do not join Part IV–A. I had not thought that the application *vel non* of overbreadth analysis should depend on the Court's judgment as to the value of the protected speech that might be deterred. Cf. *ante*, at 743. Except in the context of commercial speech, see *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380–381 (1977), it has not in the past. See, *e. g.*, *Lewis* v. *New Orleans*, 415 U. S. 130 (1974); *Gooding* v. *Wilson*, 405 U. S. 518 (1972).

As MR. JUSTICE STEVENS points out, however, *ante*, at 734, the Commission's order was limited to the facts of this case; "it did not purport to

The result turns instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes. Moreover, I doubt whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so, and from making for himself a value judgment as to the merit of the message and words. Cf. *id.*, at 77–79 (POWELL, J., concurring). These are the grounds upon which I join the judgment of the Court as to Part IV.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I agree with MR. JUSTICE STEWART that, under *Hamling* v. *United States*, 418 U. S. 87 (1974), and *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973), the word "indecent" in 18 U. S. C. § 1464 (1976 ed.) must be construed to prohibit only obscene speech. I would, therefore, normally refrain from expressing my views on any constitutional issues implicated in this case. However, I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose *its* notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

I

For the second time in two years, see *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), the Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First

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engage in formal rulemaking or in the promulgation of any regulations." In addition, since the Commission may be expected to proceed cautiously, as it has in the past, cf. Brief for Petitioner 42–43, and n. 31, I do not foresee an undue "chilling" effect on broadcasters' exercise of their rights. I agree, therefore, that respondent's overbreadth challenge is meritless.

Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court. See opinion of MR. JUSTICE POWELL, *ante*, at 761–762. Moreover, as do all parties, all Members of the Court agree that the Carlin monologue aired by Station WBAI does not fall within one of the categories of speech, such as "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), or obscenity, *Roth* v. *United States*, 354 U. S. 476 (1957), that is totally without First Amendment protection. This conclusion, of course, is compelled by our cases expressly holding that communications containing some of the words found condemnable here are fully protected by the First Amendment in other contexts. See *Eaton* v. *Tulsa*, 415 U. S. 697 (1974); *Papish* v. *University of Missouri Curators*, 410 U. S. 667 (1973); *Brown* v. *Oklahoma*, 408 U. S. 914 (1972); *Lewis* v. *New Orleans*, 408 U. S. 913 (1972); *Rosenfeld* v. *New Jersey*, 408 U. S. 901 (1972); *Cohen* v. *California*, 403 U. S. 15 (1971). Yet despite the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content, and despite our unanimous agreement that the Carlin monologue is protected speech, a majority of the Court[1] nevertheless finds that, on the facts of this case, the FCC is not constitutionally barred from imposing sanctions on Pacifica for its airing of the Carlin monologue. This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). Both the opinion of my Brother STEVENS and the opinion of my Brother POWELL rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home,

[1] Where I refer without differentiation to the actions of "the Court," my reference is to this majority, which consists of my Brothers POWELL and STEVENS and those Members of the Court joining their separate opinions.

and (2) the presence of children in the listening audience. Dispassionate analysis, removed from individual notions as to what is proper and what is not, starkly reveals that these justifications, whether individually or together, simply do not support even the professedly moderate degree of governmental homogenization of radio communications—if, indeed, such homogenization can ever be moderate given the pre-eminent status of the right of free speech in our constitutional scheme—that the Court today permits.

A

Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many—including the FCC and this Court—might find offensive.

"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California, supra,* at 21. I am in wholehearted agreement with my Brethren that an individual's right "to be let alone" when engaged in private activity within the confines of his own home is encompassed within the "substantial privacy interests" to which Mr. Justice Harlan referred in *Cohen,* and is entitled to the greatest solicitude. *Stanley* v. *Georgia,* 394 U. S. 557 (1969). However, I believe that an individual's actions in switching on

and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. See Note, Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity, 61 Va. L. Rev. 579, 618 (1975). Although an individual's decision to allow public radio communications into his home undoubtedly does not abrogate all of his privacy interests, the residual privacy interests he retains vis-à-vis the communication he voluntarily admits into his home are surely no greater than those of the people present in the corridor of the Los Angeles courthouse in *Cohen* who bore witness to the words "Fuck the Draft" emblazoned across Cohen's jacket. Their privacy interests were held insufficient to justify punishing Cohen for his offensive communication.

Even if an individual who voluntarily opens his home to radio communications retains privacy interests of sufficient moment to justify a ban on protected speech if those interests are "invaded in an essentially intolerable manner," *Cohen* v. *California, supra,* at 21, the very fact that those interests are threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks, "[t]he radio can be turned off," *Lehman* v. *Shaker Heights,* 418 U. S. 298, 302 (1974)—and with a minimum of effort. As Chief Judge Bazelon aptly observed below, "having elected to receive public air waves, the scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in *Cohen* and *Erznoznik* [v. *Jacksonville,* 422 U. S. 205 (1975)]; he can avert his attention by changing channels or turning off the set." 181 U. S. App. D. C. 132, 149, 556 F. 2d 9, 26 (1977). Whatever the minimal discomfort suffered by a

listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is clearly to follow MR. JUSTICE STEVENS' reliance on animal metaphors, *ante*, at 750–751, "to burn the house to roast the pig." *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957).

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds. Cf. *Lehman* v. *Shaker Heights*, *supra*. *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970), relied on by the FCC and by the opinions of my Brothers POWELL and STEVENS, confirms rather than belies this conclusion. In *Rowan*, the Court upheld a statute, 39 U. S. C. § 4009 (1964 ed., Supp. IV), permitting householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists. Unlike the situation here, householders who wished to receive the sender's communications were not prevented from doing so. Equally important, the determination of offensiveness *vel non* under the statute involved in *Rowan* was completely within the hands of the individual householder; no governmental evaluation of the worth of the mail's content stood between the mailer and the householder. In contrast, the visage of the censor is all too discernible here.

B

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. Although the government unquestionably has a special interest in the well-being of children and consequently "can adopt more stringent controls on communicative materials available to youths than on those available to adults," *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 212 (1975); see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 106–107 (1973) (BRENNAN, J., dissenting), the Court has accounted for this societal interest by adopting a "variable obscenity" standard that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors. *Ginsberg* v. *New York*, 390 U. S. 629 (1968). It is true that the obscenity standard the *Ginsberg* Court adopted for such materials was based on the then-applicable obscenity standard of *Roth* v. *United States*, 354 U. S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), and that "[w]e have not had occasion to decide what effect *Miller* [v. *California*, 413 U. S. 15 (1973)] will have on the *Ginsberg* formulation." *Erznoznik* v. *Jacksonville*, *supra*, at 213 n. 10. Nevertheless, we have made it abundantly clear that "under any test of obscenity as to minors . . . to be obscene 'such expression must be, in some significant way, erotic.'" 422 U. S., at 213 n. 10, quoting *Cohen* v. *California*, 403 U. S., at 20.

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them.[2] It thus ignores our recent admoni-

[2] Even if the monologue appealed to the prurient interest of minors,

tion that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U. S., at 213–214.[3] The Court's refusal to follow its own pronouncements is especially lamentable since it has the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not constitutionally be kept even from children. This result violates in spades the principle of *Butler* v. *Michigan, supra*. *Butler* involved a challenge to a Michigan statute that forbade the publication, sale, or distribution of printed material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." 352 U. S., at 381. Although *Roth* v. *United States, supra,* had not yet been decided, it is at least arguable that the material the statute in *Butler* was designed to suppress could have been constitutionally denied to children. Nevertheless, this Court

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it would not be obscene as to them unless, as to them, "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, 413 U. S. 15, 24 (1973).

[3] It may be that a narrowly drawn regulation prohibiting the use of offensive language on broadcasts directed specifically at younger children constitutes one of the "other legitimate proscription[s]" alluded to in *Erznoznik*. This is so both because of the difficulties inherent in adapting the *Miller* formulation to communications received by young children, and because such children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees." *Ginsberg* v. *New York*, 390 U. S. 629, 649–650 (1968) (STEWART, J., concurring). I doubt, as my Brother STEVENS suggests, *ante*, at 745 n. 20, that such a limited regulation amounts to a regulation of speech based on its content, since, by hypothesis, the only persons at whom the regulated communication is directed are incapable of evaluating its content. To the extent that such a regulation is viewed as a regulation based on content, it marks the outermost limits to which content regulation is permissible.

found the statute unconstitutional. Speaking for the Court, Mr. Justice Frankfurter reasoned:

> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." 352 U. S., at 383–384.

Where, as here, the government may not prevent the exposure of minors to the suppressed material, the principle of *Butler* applies *a fortiori*. The opinion of my Brother POWELL acknowledges that there lurks in today's decision a potential for " 'reduc[ing] the adult population . . . to [hearing] only what is fit for children,' " *ante*, at 760, but expresses faith that the FCC will vigilantly prevent this potential from ever becoming a reality. I am far less certain than my Brother POWELL that such faith in the Commission is warranted, see *Illinois Citizens Committee for Broadcasting* v. *FCC*, 169 U. S. App. D. C. 166, 187–190, 515 F. 2d 397, 418–421 (1975) (statement of Bazelon, C. J., as to why he voted to grant rehearing en banc); and even if I shared it, I could not so easily shirk the responsibility assumed by each Member of this Court jealously to guard against encroachments on First Amendment freedoms.

In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother POWELL, *ante*, at 757–758, and my Brother STEVENS, *ante*, at 749–750, both stress the time-honored right of a parent to raise his child as he sees fit—a right this Court has consistently been vigilant to protect. See *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). Yet this principle supports a

result directly contrary to that reached by the Court. *Yoder* and *Pierce* hold that parents, *not* the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.[4]

C

As demonstrated above, neither of the factors relied on by both the opinion of my Brother POWELL and the opinion of my Brother STEVENS—the intrusive nature of radio and the presence of children in the listening audience—can, when taken on its own terms, support the FCC's disapproval of the Carlin monologue. These two asserted justifications are further plagued by a common failing: the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions constituting the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive. Taken to their logical extreme, these rationales would support the cleansing of public

[4] The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of "spectrum scarcity" to support their result. As Chief Judge Bazelon noted below, "although scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship." 181 U. S. App. D. C., at 152, 556 F. 2d, at 29 (emphasis in original). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 396 (1969).

radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.[5]

In order to dispel the specter of the possibility of so unpalatable a degree of censorship, and to defuse Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case, which it describes as involving "broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience." Brief for Petitioner 45. The opinions of both my Brother POWELL and my Brother STEVENS take the FCC at its word, and consequently do no more than permit the Commission to censor the afternoon broadcast of the "sort of verbal shock treatment," opinion of MR. JUSTICE POWELL, *ante*, at 757, involved here. To insure that the FCC's regulation of protected speech does not exceed these bounds, my Brother POWELL is content to rely upon the judgment of the

[5] See, *e. g.*, I Samuel 25:22: "So and more also do God unto the enemies of David, if I leave of all that *pertain* to him by the morning light any that pisseth against the wall"; II Kings 18:27 and Isaiah 36:12: "[H]ath *he* not *sent me* to the men which sit on the wall, that they may eat their own dung, and drink their own piss with you?"; Ezekiel 23:3: "And they committed whoredoms in Egypt; they committed whoredoms in their youth; there were their breasts pressed, and there they bruised the teats of their virginity."; Ezekiel 23:21: "Thus thou calledst to remembrance the lewdnes of thy youth, in bruising thy teats by the Egyptians for the paps of thy youth." The Holy Bible (King James Version) (Oxford 1897).

Commission while my Brother STEVENS deems it prudent to rely on this Court's ability accurately to assess the worth of various kinds of speech.[6] For my own part, even accepting that this case is limited to its facts,[7] I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand.

II

The absence of any hesitancy in the opinions of my Brothers POWELL and STEVENS to approve the FCC's censorship of the Carlin monologue on the basis of two demonstrably inadequate grounds is a function of their perception that the decision will result in little, if any, curtailment of communicative exchanges protected by the First Amendment. Although the extent to

[6] Although ultimately dependent upon the outcome of review in this Court, the approach taken by my Brother STEVENS would not appear to tolerate the FCC's suppression of any speech, such as political speech, falling within the core area of First Amendment concern. The same, however, cannot be said of the approach taken by my Brother POWELL, which, on its face, permits the Commission to censor even political speech if it is sufficiently offensive to community standards. A result more contrary to rudimentary First Amendment principles is difficult to imagine.

[7] Having insisted that it seeks to impose sanctions on radio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in this case, 56 F. C. C. 2d 94 (1975) and 59 F. C. C. 2d 892 (1976), as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." 56 F. C. C. 2d, at 98. For surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of "verbal shock treatment" condemned here, or even this "shock treatment" type of offensive broadcast during the late evening.

which the Court stands ready to countenance FCC censorship of protected speech is unclear from today's decision, I find the reasoning by which my Brethren conclude that the FCC censorship they approve will not significantly infringe on First Amendment values both disingenuous as to reality and wrong as a matter of law.

My Brother STEVENS, in reaching a result apologetically described as narrow, *ante,* at 750, takes comfort in his observation that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," *ante,* at 743 n. 18, and finds solace in his conviction that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Ibid.* The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word. Mr. Justice Harlan, speaking for the Court, recognized the truism that a speaker's choice of words cannot surgically be separated from the ideas he desires to express when he warned that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen* v. *California,* 403 U. S., at 26. Moreover, even if an alternative phrasing may communicate a speaker's abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications. This, too, was apparent to Mr. Justice Harlan and the Court in *Cohen.*

> "[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it con-

> veys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." *Id.*, at 25–26.

My Brother STEVENS also finds relevant to his First Amendment analysis the fact that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear [the tabooed] words." *Ante*, at 750 n. 28. My Brother POWELL agrees: "The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion." *Ante*, at 760. The opinions of my Brethren display both a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford, and a naive innocence of the reality that in many cases, the medium may well be the message.

The Court apparently believes that the FCC's actions here can be analogized to the zoning ordinances upheld in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). For two reasons, it is wrong. First, the zoning ordinances found to pass constitutional muster in *Young* had valid goals other than the channeling of protected speech. *Id.*, at 71 n. 34 (opinion of STEVENS, J.); *id.*, at 80 (POWELL, J., concurring). No such goals are present here. Second, and crucial to the opinions of my Brothers POWELL and STEVENS in *Young*—opinions, which, as they do in this case, supply the bare five-person majority of the Court—the ordinances did not restrict the access of distributors or exhibitors to the market or impair

the viewing public's access to the regulated material. *Id.*, at 62, 71 n. 35 (opinion of STEVENS, J.); *id.*, at 77 (POWELL, J., concurring). Again, this is not the situation here. Both those desiring to receive Carlin's message over the radio and those wishing to send it to them are prevented from doing so by the Commission's actions. Although, as my Brethren point out, Carlin's message may be disseminated or received by other means, this is of little consolation to those broadcasters and listeners who, for a host of reasons, not least among them financial, do not have access to, or cannot take advantage of, these other means.

Moreover, it is doubtful that even those frustrated listeners in a position to follow my Brother POWELL's gratuitous advice and attend one of Carlin's performances or purchase one of his records would receive precisely the same message Pacifica's radio station sent its audience. The airways are capable not only of carrying a message, but also of transforming it. A satirist's monologue may be most potent when delivered to a live audience; yet the choice whether this will in fact be the manner in which the message is delivered and received is one the First Amendment prohibits the government from making.

III

It is quite evident that I find the Court's attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers POWELL and STEVENS another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425 (1918) (Holmes, J.). The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation. Academic research indicates that this is indeed the case. See B. Jackson, "Get Your Ass in the Water and Swim Like Me" (1974); J. Dillard, Black English (1972); W. Labov, Language in the Inner City: Studies in the Black English Vernacular (1972). As one researcher concluded, "[w]ords generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." C. Bins, "Toward an Ethnography of Contemporary African American Oral Poetry," Language and Linguistics Working Papers No. 5, p. 82 (Georgetown Univ. Press 1972). Cf. *Keefe* v. *Geanakos*, 418 F. 2d 359, 361 (CA1 1969) (finding the use of the word "motherfucker" commonplace among young radicals and protesters).

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds.[8]

[8] Under the approach taken by my Brother POWELL, the availability of broadcasts *about* groups whose members constitute such audiences might also be affected. Both news broadcasts about activities involving these groups and public affairs broadcasts about their concerns are apt to contain interviews, statements, or remarks by group leaders and members which may contain offensive language to an extent my Brother POWELL finds unacceptable.

In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking. See *Moore* v. *East Cleveland*, 431 U. S. 494, 506–511 (1977) (BRENNAN, J., concurring).

Pacifica, in response to an FCC inquiry about its broadcast of Carlin's satire on " 'the words you couldn't say on the public . . . airways,' " explained that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." 56 F. C. C. 2d, at 95, 96. In confirming Carlin's prescience as a social commentator by the result it reaches today, the Court evinces an attitude toward the "seven dirty words" that many others besides Mr. Carlin and Pacifica might describe as "silly." Whether today's decision will similarly prove "harmless" remains to be seen. One can only hope that it will.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

The Court today recognizes the wise admonition that we should "avoid the unnecessary decision of [constitutional] issues." *Ante*, at 734. But it disregards one important application of this salutary principle—the need to construe an Act of Congress so as to avoid, if possible, passing upon its constitutionality.[1] It is apparent that the constitutional questions raised by the order of the Commission in this case are substantial.[2] Before deciding them, we should be certain that it is necessary to do so.

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[1] See, *e. g.*, *Johnson* v. *Robison*, 415 U. S. 361, 366–367; *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369; *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 569; *Ashwander* v. *TVA*, 297 U. S. 288, 348 (Brandeis, J., concurring); *Crowell* v. *Benson*, 285 U. S. 22, 62.

[2] The practice of construing a statute to avoid a constitutional confrontation is followed whenever there is " 'a serious doubt' " as to the statute's

The statute pursuant to which the Commission acted, 18 U. S. C. § 1464 (1976 ed.),[3] makes it a federal offense to utter "any obscene, indecent, or profane language by means of radio communication." The Commission held, and the Court today agrees, that "indecent" is a broader concept than "obscene" as the latter term was defined in *Miller* v. *California*, 413 U. S. 15, because language can be "indecent" although it has social, political, or artistic value and lacks prurient appeal. 56 F. C. C. 2d 94, 97–98.[4] But this construction of § 1464, while perhaps plausible, is by no means compelled. To the contrary, I think that "indecent" should properly be read as meaning no more than "obscene." Since the Carlin monologue concededly was not "obscene," I believe that the Commission lacked statutory authority to ban it. Under this construction of the statute, it is unnecessary to address the difficult and important issue of the Commission's constitutional power to prohibit speech that

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constitutionality. *E. g., United States* v. *Rumely*, 345 U. S. 41, 45; *Blodgett* v. *Holden*, 275 U. S. 142, 148 (opinion of Holmes, J.). Thus, the Court has construed a statute to avoid raising a doubt as to its constitutionality even though the Court later in effect held that the statute, otherwise construed, would have been constitutionally valid. Compare *General Motors Corp.* v. *District of Columbia*, 380 U. S. 553, with *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267.

[3] The Court properly gives no weight to the Commission's passing reference in its order to 47 U. S. C. § 303 (g). *Ante*, at 739 n. 13. For one thing, the order clearly rests only upon the Commission's interpretation of the term "indecent" in § 1464; the attempt by the Commission in this Court to assert that § 303 (g) was an independent basis for its action must fail. Cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94–95; *SEC* v. *Sloan*, 436 U. S. 103, 117–118. Moreover, the general language of § 303 (g) cannot be used to circumvent the terms of a specific statutory mandate such as that of § 1464. "[T]he Commission's power in this respect is limited by the scope of the statute. Unless the [language] involved here [is] illegal under § [1464], the Commission cannot employ the statute to make [it] so by agency action." *FCC* v. *American Broadcasting Co.*, 347 U. S. 284, 290.

[4] The Commission did not rely on § 1464's prohibition of "profane" language, and it is thus unnecessary to consider the scope of that term.

would be constitutionally protected outside the context of electronic broadcasting.

This Court has recently decided the meaning of the term "indecent" in a closely related statutory context. In *Hamling* v. *United States*, 418 U. S. 87, the petitioner was convicted of violating 18 U. S. C. § 1461, which prohibits the mailing of "[e]very obscene, lewd, lascivious, indecent, filthy or vile article." The Court "construe[d] the generic terms in [§ 1461] to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California.*'" 418 U. S., at 114, quoting *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 130 n. 7. Thus, the clear holding of *Hamling* is that "indecent" as used in § 1461 has the same meaning as "obscene" as that term was defined in the *Miller* case. See also *Marks* v. *United States*, 430 U. S. 188, 190 (18 U. S. C. § 1465).

Nothing requires the conclusion that the word "indecent" has any meaning in § 1464 other than that ascribed to the same word in § 1461.[5] Indeed, although the legislative history is largely silent,[6] such indications as there are support the view that §§ 1461 and 1464 should be construed similarly. The view that "indecent" means no more than "obscene" in § 1461 and similar statutes long antedated *Hamling*. See *United States* v. *Bennett*, 24 F. Cas. 1093 (No. 14,571) (CC SDNY 1879); *Dunlop* v. *United States*, 165 U. S. 486, 500–501;

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[5] The only Federal Court of Appeals (apart from this case) to consider the question has held that "'obscene' and 'indecent' in § 1464 are to be read as parts of a single proscription, applicable only if the challenged language appeals to the prurient interest." *United States* v. *Simpson*, 561 F. 2d 53, 60 (CA7).

[6] Section 1464 originated as part of § 29 of the Radio Act of 1927, 44 Stat. 1172, which was re-enacted as § 326 of the Communications Act of 1934, 48 Stat. 1091. Neither the committee reports nor the floor debates contain any discussion of the meaning of "obscene, indecent or profane language."

Manual Enterprises v. *Day*, 370 U. S. 478, 482–484, 487 (opinion of Harlan, J.).[7] And although §§ 1461 and 1464 were originally enacted separately, they were codified together in the Criminal Code of 1948 as part of a chapter entitled "Obscenity." There is nothing in the legislative history to suggest that Congress intended that the same word in two closely related sections should have different meanings. See H. R. Rep. No. 304, 80th Cong., 1st Sess., A104–A106 (1947).

I would hold, therefore, that Congress intended, by using the word "indecent" in § 1464, to prohibit nothing more than obscene speech.[8] Under that reading of the statute, the Commission's order in this case was not authorized, and on that basis I would affirm the judgment of the Court of Appeals.

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[7] When the Federal Communications Act was amended in 1968 to prohibit "obscene, lewd, lascivious, filthy, or indecent" telephone calls, 82 Stat. 112, 47 U. S. C. § 223, the FCC itself indicated that it thought this language covered only "obscene" telephone calls. See H. R. Rep. No. 1109, 90th Cong., 2d Sess., 7–8 (1968).

[8] This construction is further supported by the general rule of lenity in construing criminal statutes. See *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 285. The Court's statement that it need not consider the meaning § 1464 would have in a criminal prosecution, *ante*, at 739 n. 13, is contrary to settled precedent:

"It is true . . . that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § [1464] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases." *FCC* v. *American Broadcasting Co.*, *supra*, at 296.

ALABAMA ET AL. v. PUGH ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77–1107. Decided July 3, 1978

In respondent present and former prison inmates' suit against petitioners (the State of Alabama, the Alabama Board of Corrections, and several prison officials), the District Court issued an injunction prescribing measures to eradicate cruel and unusual punishment in the Alabama prison system. The Court of Appeals affirmed with some modifications. *Held:* The District Court's injunction insofar as it was issued against the State and the Board of Corrections violates the State's Eleventh Amendment immunity absent the State's consent to suit.

Certiorari granted; 559 F. 2d 283, reversed in part and remanded.

PER CURIAM.

Respondents, inmates or former inmates of the Alabama prison system, sued petitioners, who include the State of Alabama and the Alabama Board of Corrections as well as a number of Alabama officials responsible for the administration of its prisons, alleging that conditions in Alabama prisons constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The United States District Court agreed and issued an order prescribing measures designed to eradicate cruel and unusual punishment in the Alabama prison system. The Court of Appeals for the Fifth Circuit affirmed but modified some aspects of the order which it believed exceeded the limits of the appropriate exercise of the court's remedial powers. 559 F. 2d 283.

Among the claims raised here by petitioners is that the issuance of a mandatory injunction against the State of Alabama and the Alabama Board of Corrections is unconstitutional because the Eleventh Amendment prohibits federal courts from entertaining suits by private parties against States and their agencies. The Court of Appeals did not address this contention, perhaps because it was of the view that in light of

the numerous individual defendants in the case dismissal as to these two defendants would not affect the scope of the injunction. There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. *Edelman* v. *Jordan*, 415 U. S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 (1945); *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292 (1937). Respondents do not contend that Alabama has consented to this suit, and it appears that no consent could be given under Art. I, § 14, of the Alabama Constitution, which provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Moreover, the question of the State's Eleventh Amendment immunity is not merely academic. Alabama has an interest in being dismissed from this action in order to eliminate the danger of being held in contempt if it should fail to comply with the mandatory injunction.[1] Consequently, we grant the petition for certiorari limited to Question 2 presented by petitioners,[2] reverse the judgment in part, and remand the case to the Court of Appeals with instructions to order the dismissal of the State of Alabama and the Alabama Board of Corrections from this action.

So ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL dissent.

MR. JUSTICE STEVENS, dissenting.

This Court is much too busy to spend its time correcting

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[1] Respondents contend that petitioners failed to raise the Eleventh Amendment issue in the District Court. The Court held in *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974), however, that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court . . . ."

[2] "Whether the mandatory injunction issued against the State of Alabama and the Alabama Board of Corrections violates the State's Eleventh

harmless errors. Nothing more is accomplished by the summary action it takes today.*

The Court does not question the propriety of the injunctive relief entered by the District Court and upheld by the Court of Appeals. Striking the State's name from the list of parties will have no impact on the effectiveness of that relief. If the state officers disobey the injunction, financial penalties may be imposed on the responsible state agencies. *Hutto* v. *Finney*, 437 U. S. 678. The District Court's asserted error did not trouble the Court of Appeals because it has no practical significance. It does not justify the exercise of this Court's certiorari jurisdiction. I respectfully dissent.

Amendment immunity or exceeds the jurisdiction granted federal courts by 42 U. S. C. § 1983."

*Surely the Court does not intend to resolve summarily the issue debated by my Brothers in their separate opinions in *Hutto* v. *Finney*, 437 U. S. 678, 700 (BRENNAN, J., concurring), and 708–709, n. 6 (POWELL, J., concurring in part and dissenting in part).

Reporter's Note

The next page is purposely numbered 901. The numbers between 783 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 26 THROUGH JULY 3, 1978

JUNE 26, 1978

Vacated and Remanded on Appeal

No. 76–1606. CONSUMERS UNION OF UNITED STATES, INC., ET AL. *v.* HEIMANN, SUPERINTENDENT OF BANKS OF NEW YORK. Appeal from D. C. S. D. N. Y. Judgment vacated and case remanded for further consideration in light of *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978). Reported below: 427 F. Supp. 840.

Certiorari Granted—Vacated and Remanded

No. 75–1723. MUZQUIZ ET AL. *v.* CITY OF SAN ANTONIO ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Monell* v. *Department of Social Services of City of New York*, 436 U. S. 658 (1978). Reported below: 528 F. 2d 499.

No. 76–1543. UNITED STATES *v.* GRASSO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Scott*, 437 U. S. 82 (1978), and *Arizona* v. *Washington*, 434 U. S. 497 (1978). Reported below: 552 F. 2d 46.

No. 76–5224. THURSTON *v.* DEKLE, CHAIRMAN, CIVIL SERVICE BOARD, JACKSONVILLE, FLORIDA, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Monell* v. *Department of Social Services of City of New York*, 436 U. S. 658 (1978). Reported below: 531 F. 2d 1264.

No. 77–532. KORNIT *v.* BOARD OF EDUCATION OF PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT, PLAINVIEW, NEW YORK. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Monell* v. *Department of Social Services of City of New York,* 436 U. S. 658 (1978). Reported below: 542 F. 2d 593.

No. 77–914. CITY OF INDEPENDENCE, MISSOURI, ET AL. *v.* OWEN. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Monell* v. *Department of Social Services of City of New York,* 436 U. S. 658 (1978). Reported below: 560 F. 2d 925.

No. 77–1289. LUTHERAN HOSPITAL OF MILWAUKEE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Beth Israel Hospital* v. *National Labor Relations Board,* 437 U. S. 483 (1978). Reported below: 564 F. 2d 208.

No. 77–1473. MCARTHUR *v.* NOURSE, JUDGE. Sup. Ct. Fla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Greene* v. *Massey,* 437 U. S. 19 (1978), and *Burks* v. *United States,* 437 U. S. 1 (1978). Reported below: 358 So. 2d 132.

No. 77–1503. PARKER, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS *v.* BERGY ET AL. C. C. P. A. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Parker* v. *Flook,* 437 U. S. 584 (1978). Reported below: 563 F. 2d 1031.

No. 77–5996. WILLIAMS *v.* RICKETTS, WARDEN. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Greene* v. *Massey,* 437 U. S. 19 (1978), and *Burks* v. *United States,* 437 U. S. 1 (1978). Reported below: 240 Ga. 148, 240 S. E. 2d 41.

No. 77–6355. VINSON *v.* RICHMOND POLICE DEPARTMENT ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Monell* v. *Department of Social Services of City of New York*, 436 U. S. 658 (1978). Reported below: 567 F. 2d 263.

Miscellaneous Orders

No. A–1066. BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT *v.* STATE BOARD OF EDUCATION OF OHIO ET AL. Application for stay of judgment of the Supreme Court of Ohio, presented to MR. JUSTICE STEVENS, and by him referred to the Court, denied.

No. 77–388. WASHINGTON ET AL. *v.* CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION. C. A. 9th Cir. [Probable jurisdiction noted, 435 U. S. 903.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Appellants also allotted an additional 15 minutes for oral argument.

No. 77–533. HISQUIERDO *v.* HISQUIERDO. Sup. Ct. Cal. [Certiorari granted, 435 U. S. 994.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Respondent also allotted 15 additional minutes for oral argument.

No. 77–891. BEAL, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. *v.* FRANKLIN ET AL. D. C. E. D. Pa. [Probable jurisdiction noted, 435 U. S. 913.] Motion of Americans United for Life, Inc., for leave to file a brief as *amicus curiae* granted.

No. 77–961. NEW YORK TELEPHONE CO. ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL. C. A. 2d Cir. [Certiorari granted, 435 U. S. 941.] Motions of Center on National Labor Policy and Stephen R. Havas et al. for leave to file briefs as *amici curiae* granted.

No. 77–1305. PARKLANE HOSIERY CO., INC., ET AL. *v.* SHORE. C. A. 2d Cir. [Certiorari granted, 435 U. S. 1006.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted.

Certiorari Granted

No. 77–1427. NEW YORK CITY TRANSIT AUTHORITY ET AL. *v.* BEAZER ET AL. C. A. 2d Cir. Certiorari granted limited to Questions 3 and 4 presented by the petition. Reported below: 558 F. 2d 97.

Certiorari Denied

No. 75–1710. RANKIN COUNTY BOARD OF EDUCATION ET AL. *v.* ADAMS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 928.

No. 75–1797. COMMISSIONERS OF ELECTION OF UNION COUNTY ET AL. *v.* LYTLE. C. A. 4th Cir. Certiorari denied. Reported below: 541 F. 2d 421.

No. 77–555. BUCK *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 553 F. 2d 315.

No. 77–657. FLINT ET AL. *v.* GAGLIARDI. C. A. 3d Cir. Certiorari denied. Reported below: 564 F. 2d 112.

No. 77–688. LOWELL SCHOOL DISTRICT NO. 71 *v.* KERR. C. A. 9th Cir. Certiorari denied. Reported below: 558 F. 2d 1037.

No. 77–731. CITY OF PITTSBURGH *v.* MAHONE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 564 F. 2d 1018.

No. 77–919. BRITISH AMERICAN COMMODITY OPTIONS CORP. *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 560 F. 2d 135.

No. 77–1261. MYSLAJEK ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 568 F. 2d 55.

No. 77–1312. DONOHOE CONSTRUCTION CO., INC. *v.* MONTGOMERY COUNTY COUNCIL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 567 F. 2d 603.

No. 77–5061. THOMAS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied.

No. 77–5935. SHAW *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 239 Ga. 690, 238 S. E. 2d 434.

No. 77–6571. BARTOLI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 572 F. 2d 188.

No. 77–890. NEW YORK *v.* GARLAND. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 59 App. Div. 2d 538, 396 N. Y. S. 2d 1015.

No. 77–1146. CARVER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 344 So. 2d 332.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

On February 12, 1976, members of the Pinellas County, Fla., Sheriff's office seized from petitioner, an employee of a movie theater, a copy of an allegedly obscene movie. Subsequently, petitioner, after reserving his right to appeal from the denial of various pretrial motions, pleaded *nolo contendere* to the felony of possessing obscene material with the intent to exhibit, defined in Fla. Stat. § 847.011 (1)(a) (1977).

Section 847.011 (1)(a), which is set out in the margin,* has been authoritatively construed by the Florida Supreme Court to contain the standards enunciated by this Court in *Miller* v. *California,* 413 U. S. 15 (1973), and *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973). See *Rhodes* v. *State,* 283 So. 2d 351, 354–355, 359 (1973). Because I continue to adhere to my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents," *Paris Adult Theatre I* v. *Slaton, supra,* at 113 (dissenting opinion), I would grant certiorari and summarily reverse petitioner's conviction. See *Miller* v. *California, supra,* at 47 (BRENNAN, J., dissenting).

No. 77–1426. CARGAL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 144 Ga. App. 238, 241 S. E. 2d 8.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner, convicted of distributing obscene materials under Ga. Code § 26–2101 (1975), asks this Court to decide the question:

> "Whether jury instructions on *scienter* allowing a finding of 'constructive knowledge' in an obscenity case are sufficient to meet . . . constitutional minimum standards. . . ?" Pet. for Cert. 2.

In *Ballew* v. *Georgia,* 435 U. S. 223 (1978), we granted certio-

*"A person who knowingly . . . has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic . . . motion-picture film . . . is guilty of a misdemeanor of the first degree . . . . A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree . . . ."

rari to consider, but did not reach, precisely this issue. See Pet. for Cert. in *Ballew* v. *Georgia*, O. T. 1977, No. 76–761, p. 2. I see no reason to suppose that this issue is any less worthy of consideration on certiorari now than it was when we accepted it in *Ballew*. For this reason, I would grant certiorari. See also *Sewell* v. *Georgia*, 435 U. S. 982 (1978) (BRENNAN, J., dissenting from dismissal of appeal); *Teal* v. *Georgia*, 435 U. S. 989 (1978) (same); *Robinson* v. *Georgia*, 435 U. S. 991 (1978) (BRENNAN, J., dissenting from vacation of judgment and remand). Barring this, I would grant this petition and summarily reverse. See *Ballew*, *supra*, at 246 (opinion of BRENNAN, J.); *Sanders* v. *Georgia*, 424 U. S. 931 (1976) (dissent from denial of certiorari).

No. 77–1203. MITCHELL *v.* BEARD, ADMINISTRATRIX. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 563 F. 2d 331.

No. 77–1221. FLYNN ET AL. *v.* BAUMAN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 570 F. 2d 347.

No. 77–1294. REEVES *v.* WAND. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 567 F. 2d 392.

No. 77–1519. LANSING BOARD OF EDUCATION ET AL. *v.* N. A. A. C. P. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 571 F. 2d 582.

Rehearing Denied

No. 76–1172. FIRST NATIONAL BANK OF BOSTON ET AL. *v.* BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, 435 U. S. 765; and

No. 76–1800. UNITED STATES *v.* SOTELO ET UX., 436 U. S. 268. Petitions for rehearing denied.

No. 76-6767. SCOTT ET AL. *v.* UNITED STATES, 436 U. S. 128;

No. 77-293. KULKO *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO (HORN, REAL PARTY IN INTEREST), 436 U. S. 84;

No. 77-950. COLLECTION CONSULTANTS, INC., ET AL. *v.* TEXAS, 436 U. S. 901;

No. 77-1161. DREBIN ET AL. *v.* UNITED STATES, 436 U. S. 904;

No. 77-1228. NICKELL *v.* UNITED STATES, 436 U. S. 904;

No. 77-1275. MARTIN B. GLAUSER DODGE CO. *v.* CHRYSLER CORP. ET AL., 436 U. S. 913;

No. 77-1287. FISHER *v.* OHIO, 435 U. S. 1005;

No. 77-1297. LAX *v.* UNITED STATES, 436 U. S. 917;

No. 77-5291. LEE *v.* UNITED STATES, 436 U. S. 931;

No. 77-6293. HARRIS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, 436 U. S. 928;

No. 77-6378. THOMAS *v.* GEORGIA, 436 U. S. 914;

No. 77-6399. BATTEN *v.* VIRGINIA, 436 U. S. 909;

No. 77-6408. CLAYTON *v.* LOGGINS, CORRECTIONAL SUPERINTENDENT, ET AL., 436 U. S. 909;

No. 77-6412. JUSTICE *v.* HESSELDEN PLUMBING CO., 436 U. S. 909;

No. 77-6420. WION *v.* UNITED STATES, 436 U. S. 910;

No. 77-6421. SEK *v.* BETHLEHEM STEEL CORP., 436 U. S. 920;

No. 77-6424. CORN *v.* GEORGIA, 436 U. S. 914;

No. 77-6426. DOWNING *v.* FRAGGASSI ET AL., 436 U. S. 910;

No. 77-6445. O'NEAL *v.* GRIFFIN ET AL., 436 U. S. 920;

No. 77-6497. SELLARS *v.* BUSCH ET AL., 436 U. S. 928;

No. 77-6503. DESANTIS *v.* UNITED STATES, 436 U. S. 911;

No. 77-6633. PIERCE *v.* INDIANA ET AL., 436 U. S. 922;

No. 77-6647. DAVIS *v.* UNITED STATES, 436 U. S. 929; and

No. 77-6659. SUPPLEE *v.* UNITED STATES, 436 U. S. 930. Petitions for rehearing denied.

No. 77–1286. CITY OF EAST DETROIT *v.* LLEWELLYN ET AL., 435 U. S. 1008; and

No. 77–6130. LITTLE *v.* UNITED STATES, 435 U. S. 969. Motions for leave to file petitions for rehearing denied.

JUNE 28, 1978

Dismissal Under Rule 60

No. 77–6680. FRAZIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 573 F. 2d 1307.

JULY 3, 1978

Appeal Dismissed

No. 77–929. BLACK *v.* PAYNE, EXECUTIVE OFFICER, PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of substantial federal question.

Vacated and Remanded on Appeal

No. 77–1067. LOS ANGELES COUNTY ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL.;

No. 77–1078. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL. *v.* KREPS, SECRETARY OF COMMERCE, ET AL.; and

No. 77–1271. KREPS, SECRETARY OF COMMERCE *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL. Appeals from D. C. C. D. Cal. Judgment vacated and cases remanded to consider question of mootness. Reported below: 441 F. Supp. 955.

No. 77–5541. DOWNS *v.* OHIO; and

No. 77–5708. SHELTON *v.* OHIO. Appeals from Sup. Ct. Ohio. Motions for leave to proceed *in forma pauperis* granted. Judgments vacated insofar as they leave undisturbed the death penalties imposed, and cases remanded for further proceedings. See *Lockett* v. *Ohio, ante,* p. 586. Reported below: No. 77–5541, 51 Ohio St. 2d 47, 364 N. E. 2d 1140; No. 77–5708, 51 Ohio St. 2d 68, 364 N. E. 2d 1152.

Certiorari Granted—Reversed and Remanded. (See No. 77–1107, *ante*, p. 781.)

Certiorari Granted—Vacated and Remanded

No. 76–1308. WOODS ET AL. *v.* OHIO. Sup. Ct. Ohio. Motion of American Civil Liberties Union of Ohio Foundation, Inc., for leave to file a brief as *amicus curiae* and certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further proceedings. See *Lockett* v. *Ohio*, *ante*, p. 586. Reported below: 48 Ohio St. 2d 127, 357 N. E. 2d 1059.

No. 76–1871. UNITED STATES *v.* MORIANI. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Grayson*, *ante*, p. 41. Reported below: 555 F. 2d 353.

In the following cases (No. 76–6523 through No. 77–6645) motions for leave to proceed *in forma pauperis* and petitions for writs of certiorari are granted, judgments are vacated insofar as they leave undisturbed the death penalties imposed, and the cases are remanded for further proceedings. See *Lockett* v. *Ohio*, *ante*, p. 586.

No. 76–6523. ROBERTS *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio St. 2d 221, 358 N. E. 2d 530;

No. 76–6525. HALL *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio. St. 2d 325, 358 N. E. 2d 590;

No. 76–6547. BLACK *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio St. 2d 262, 358 N. E. 2d 551;

No. 76–6575. LYTLE *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio St. 2d 391, 358 N. E. 2d 623;

No. 76–6769. BATES *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio St. 2d 315, 358 N. E. 2d 584;

No. 76–6783. STRODES *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio St. 2d 113, 357 N. E. 2d 375;

No. 76–6784. BAYLESS *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio St. 2d 73, 357 N. E. 2d 1035;

No. 76–6786. OSBORNE *v.* OHIO. Sup. Ct. Ohio. Reported below: 49 Ohio St. 2d 135, 359 N. E. 2d 78;

No. 76–6829. HANCOCK *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio St. 2d 147, 358 N. E. 2d 273;

No. 76–6837. EDWARDS *v.* OHIO. Sup. Ct. Ohio. Reported below: 49 Ohio St. 2d 31, 358 N. E. 2d 1051;

No. 76–6838. LANE *v.* OHIO. Sup. Ct. Ohio. Reported below: 49 Ohio St. 2d 77, 358 N. E. 2d 1081;

No. 76–6951. HARRIS *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio St. 2d 351, 359 N. E. 2d 67;

No. 76–6952. ROYSTER *v.* OHIO. Sup. Ct. Ohio. Reported below: 48 Ohio St. 2d 381, 358 N. E. 2d 616;

No. 76–6985. PERRYMAN *v.* OHIO. Sup. Ct. Ohio. Reported below: 49 Ohio St. 2d 14, 358 N. E. 2d 1040;

No. 77–5221. MILLER *v.* OHIO. Sup. Ct. Ohio. Reported below: 49 Ohio St. 2d 198, 361 N. E. 2d 419;

No. 77–5547. JACKSON *v.* OHIO. Sup. Ct. Ohio. Reported below: 50 Ohio St. 2d 253, 364 N. E. 2d 236;

No. 77–5604. WILLIAMS *v.* OHIO. Sup. Ct. Ohio. Reported below: 51 Ohio St. 2d 112, 364 N. E. 2d 1364;

No. 77–5787. WEIND *v.* OHIO. Sup. Ct. Ohio. Reported below: 50 Ohio St. 2d 224, 364 N. E. 2d 224;

No. 77–5826. OSBORNE *v.* OHIO. Sup. Ct. Ohio. Reported below: 50 Ohio St. 2d 211, 364 N. E. 2d 216;

No. 77–6333. COOPER *v.* OHIO. Sup. Ct. Ohio. Reported below: 52 Ohio St. 2d 163, 370 N. E. 2d 725; and

No. 77–6645. WADE *v.* OHIO. Sup. Ct. Ohio. Reported below: 53 Ohio St. 2d 182, 373 N. E. 2d 1244.

No. 76–6965. JORDAN *v.* ARIZONA. Sup. Ct. Ariz. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated insofar as it leaves undisturbed the death

penalty imposed, and case remanded for further proceedings. See *Lockett* v. *Ohio, ante,* p. 586. Reported below: 114 Ariz. 452, 561 P. 2d 1224.

No. 77–306. HALL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Franks* v. *Delaware, ante,* p. 154. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari and set case for oral argument. Reported below: 45 Ill. App. 3d 469, 359 N. E. 2d 1191.

No. 77–635. FRIDAY, PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA, ET AL. *v.* UZZELL ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Regents of the University of California* v. *Bakke, ante,* p. 265. MR. JUSTICE WHITE dissents. Reported below: 547 F. 2d 801 and 558 F. 2d 727.

Miscellaneous Orders

No. A–815. JIMENEZ ET AL. *v.* SIMS ET AL. D. C. S. D. Tex. Application for stay, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied without prejudice to appellants' filing with the court below a motion for clarification of the opinion and amended judgment of that court.

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Joint motion of the States and the United States for entry of a supplemental decree; motion of Fort Mojave Indian Tribe et al. for leave to intervene as indispensable parties; and motion of Colorado River Indian Tribes et al. for leave to intervene are set for oral argument on Monday, October 2, 1978. A total of one and one-half hours allotted for oral argument. [For earlier order herein, see, *e. g.,* 383 U. S. 268.]

No. 76–811. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* BAKKE, *ante,* p. 265. Order heretofore entered on November 15, 1976 [429 U. S. 953], granting stay pending final disposition of the case in this Court is hereby vacated.

No. 73, Orig. CALIFORNIA *v.* NEVADA. Preliminary Report of Special Master received, ordered filed, and adopted by the Court. Accordingly, motion of California State Assemblyman Mike Cullen for leave to file a brief as *amicus curiae*, motion of the State of Nevada for leave to file an amended answer setting forth a counterclaim, and motion of the State of California for leave to file an amended complaint granted. [For earlier order herein, see 433 U. S. 918.]

No. 77–533. HISQUIERDO *v.* HISQUIERDO. Sup. Ct. Cal. [Certiorari granted, 435 U. S. 994.] Motion of Ray C. Bennett, Esquire, to permit Howard M. Fields, Esquire, to present oral argument *pro hac vice* on behalf of respondent granted.

No. 77–753. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* DANIEL; and

No. 77–754. LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. *v.* DANIEL. C. A. 7th Cir. [Certiorari granted, 434 U. S. 1061.] Motion of American Bar Assn. for leave to file a brief as *amicus curiae* denied.

No. 77–891. BEAL, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. *v.* FRANKLIN ET AL. D. C. E. D. Pa. [Probable jurisdiction noted, 435 U. S. 913.] Motion of United States Catholic Conference for leave to participate in oral argument as *amicus curiae* denied. Motion of Legal Defense Fund for Unborn Children to present oral argument as *amicus curiae* denied.

No. 77–1163. FRIEDMAN ET AL. *v.* ROGERS ET AL.;

No. 77–1164. ROGERS ET AL. *v.* FRIEDMAN ET AL.; and

No. 77–1186. TEXAS OPTOMETRIC ASSN., INC. *v.* ROGERS ET AL. D. C. E. D. Tex. [Probable jurisdiction noted, 435 U. S. 967.] Motion of American Optometric Assn. for leave to file a brief as *amicus curiae* granted.

No. 77–803. BARRY, CHAIRMAN, RACING AND WAGERING BOARD OF NEW YORK, ET AL. *v.* BARCHI. D. C. S. D. N. Y. [Probable jurisdiction noted, 435 U. S. 921.] Motion of Jockeys' Guild, Inc., for leave to file a brief as *amicus curiae* granted.

Certiorari Granted

No. 77–926. CANNON *v.* UNIVERSITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 559 F. 2d 1063.

Certiorari Denied

No. 76–688. CHICAGO TYPOGRAPHICAL UNION No. 16 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 240, 539 F. 2d 242.

No. 77–174. MACHEN *v.* PATTERSON. C. A. 4th Cir. Certiorari denied. Reported below: 556 F. 2d 573.

No. 77–884. GARRETT *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 556 F. 2d 1274.

No. 77–972. MORGAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 557 S. W. 2d 124.

No. 77–1154. NEW YORK *v.* JAMES. Ct. App. N. Y. Certiorari denied. Reported below: 43 N. Y. 2d 17, 371 N. E. 2d 456.

No. 77–1173. TRINITY TRUCKING & MATERIALS CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 567 F. 2d 391.

No. 77–1205. PENNSYLVANIA *v.* MOODY. Sup. Ct. Pa. Certiorari denied. Reported below: 476 Pa. 223, 382 A. 2d 442.

No. 77–1264. READING HOSPITAL & MEDICAL CENTER *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 562 F. 2d 42.

No. 77–1298. KRAIN *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 77–1396. IDAHO EX REL. MOON, TREASURER OF IDAHO *v.* STATE BOARD OF EXAMINERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 567 F. 2d 858.

No. 77–1422. NEWMAN ET AL. *v.* ALABAMA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 283.

No. 77–1492. RAPIDES PARISH POLICE JURY ET AL. *v.* PARNELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 568 F. 2d 1367.

No. 76–418. EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC., ET AL. *v.* SMITHSONIAN INSTITUTION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 184 U. S. App. D. C. 397, 566 F. 2d 289.

No. 76–1556. BROWN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 550 F. 2d 115.

No. 77–241. COMMUNICATIONS WORKERS OF AMERICA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.;

No. 77–242. TELEPHONE COORDINATING COUNCIL TCC–1, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.; and

No. 77–243. ALLIANCE OF INDEPENDENT TELEPHONE UNIONS *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 556 F. 2d 167.

No. 77–270. STANTON, ADMINISTRATOR, DEPARTMENT OF PUBLIC WELFARE OF INDIANA, ET AL. *v.* BOND ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 555 F. 2d 172.

No. 77–684. GREENBLATT, COMMISSIONER, DEPARTMENT OF MENTAL HEALTH OF MASSACHUSETTS, ET AL. *v.* KING. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 560 F. 2d 1024.

No. 77–881. FASI, MAYOR OF HONOLULU, ET AL. *v.* POKINI, AKA AKINA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 562 F. 2d 56.

No. 77–1219. PENNSYLVANIA *v.* WHITE. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 475 Pa. 343, 380 A. 2d 753.

No. 77–955. POWELL, CHIEF, U. S. CAPITOL POLICE *v.* DELLUMS ET AL.; and

No. 77–1129. WILSON, FORMER CHIEF, METROPOLITAN POLICE DEPARTMENT, ET AL. *v.* DELLUMS ET AL. C. A. D. C. Cir. Motion of International Association of Chiefs of Police for leave to file a brief as *amicus curiae* granted. Motions of respondents to recuse MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST denied. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of these motions and petitions. Reported below: No. 77–955, 184 U. S. App. D. C. 275, 566 F. 2d 167; No. 77–1129, 184 U. S. App. D. C. 324, 566 F. 2d 216.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1975, 1976, AND 1977

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
Terms	1975	1976	1977	1975	1976	1977	1975	1976	1977	1975	1976	1977
Number of cases on dockets	14	8	14	2, 352	2, 324	2, 341	2, 395	2, 398	2, 349	4, 761	4, 730	4, 704
Number disposed of during terms	7	2	3	1, 810	1, 852	1, 911	1, 989	2, 064	1, 953	3, 806	3, 918	3, 867
Number remaining on dockets	7	6	11	542	472	430	406	334	396	955	812	837

	TERMS		
	1975	1976	1977
Cases argued during term	179	176	172
Number disposed of by full opinions	160	154	[1] 153
Number disposed of by per curiam opinions	16	22	8
Number set for reargument	3	0	9
Cases granted review this term	172	169	[2] 162
Cases reviewed and decided without oral argument	186	207	129
Total cases to be available for argument at outset of following term	99	88	75

[1] Excludes No. 77-154
[2] Includes No. 8 Orig. and No. 76 Orig.

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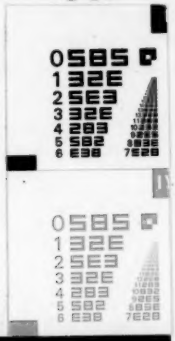
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